Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

October Term, 1994

NORTHEAST UTILITIES SERVICES CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 455, AFL-CIO-CLC
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the National Labor Relations Board incorrectly find that the Pool Coordinators and Senior Pool Coordinators were not supervisors, as defined under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11)?

2. Did the National Labor Relations Board incorrectly find that the Pool Coordinators and Senior Pool Coordinators were not managerial employees exempt from coverage under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*?

Rule 29.1 Statement

Pursuant to Rule 29.1 of the Rules of this Court, the following is a list of affiliated corporate entities of the Petitioner:

1. Northeast Utilities Service Company is a wholly owned subsidiary of Northeast Utilities.

2. Northeast Utilities is a Massachusetts Business Trust which has issued shares to the public.

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Northeast Utilities Service Corporation respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the First Circuit in *Northeast Utilities Service Corporation v. National Labor Relations Board,* reported at 35 F.3d 621 (1st Cir. 1994), is included in Appendix A, A1. The decision and order of the National Labor Relations Board granting the Motion for Summary Judgment filed by the General Counsel, reported at 313 NLRB No. 65, is included in Appendix B, B1. The Order of the National Labor Relations Board denying the Petitioner's Request for Review is included in Appendix C, C1. The decision of the Regional Director is included in Appendix D, D1.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act, ("Act"), 29 U.S.C. 152(3) provides in relevant part:

> The term "employee" shall include any employee, . . . but shall not include . . . any individual employed as a supervisor. . . .

Section 2(11) of the Act, 29 U.S.C. 152(11) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in

connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

STATEMENT OF THE CASE

In the late 1960's, New England's electric utilities determined that centralized dispatch of the New England power supply was crucial for purposes of economic efficiency and system reliability. The result was the creation of the New England Power Pool (NEPOOL), which now has some 100 utility company participants, with more than 300 separate power generation facilities and 7,000 miles of high voltage (115,000 volts and up) transmission lines.

NEPOOL centrally controls the generation and dispatch of electric power throughout New England from a control center located in Holyoke, Massachusetts. That work is done by the New England Power Exchange ("NEPEX"), the master dispatch center for New England. Assisting in this effort are four regional "satellite" facilities covering, respectively, Connecticut and Western Massachusetts (CONVEX), Rhode Island, Eastern Massachusetts and Vermont (REMVEC), New Hampshire and Maine. The nerve center of the Holyoke facility is its control room, where through a contractual agreement between NEPOOL and the Northeast Utilities Service Company ("NUSCO"), New England's electric system is managed on an hour-to-hour, minute-by-minute basis. The control room is staffed by the NUSCO employees at issue in this case, working in teams of three, and working rotating, twelve hour shifts. Those persons occupy two similar positions -- one Senior Pool Coordinator and two Pool Coordinators on each shift.

Briefly summarized, the Pool Coordinators and Senior Pool Coordinators on a given shift collectively are responsible for the overall management of the power generation and transmission activity throughout New

England. This includes the partial or total start-up and shutdown of power generation stations and equipment, the purchase or sale of power from or to neighboring power Pools in New York, Pennsylvania and Canada, and the timing and extent of the use of the hydroelectric power resources in the six-state region.

Pool Coordinators and Senior Pool Coordinators are guided in carrying out their duties by a limited number (14 total) of operating procedures. These procedures do not cover a wide variety of situations that these employees face on a daily basis. These procedures also reserve to the Pool Coordinators and Senior Pool Coordinators substantial discretion, but do outline priorities to be considered in certain circumstances, including equipment failure, cancellation of scheduled transmission outages, shedding load (i.e., initiating partial blackouts), restoring the power system in the event of a blackout, and directing the operations of the four satellite control centers. Like the Pool Coordinators and Senior Pool Coordinators, the operators of the CONVEX satellite control center are employees of NUSCO.

The Pool Coordinators and Senior Pool Coordinators both report to the Control Room Supervisor, who generally is present at the Holyoke facility (but not normally in the control room itself) from approximately 8:00 a.m. to 4:30 p.m. Monday through Friday. At all other hours and on weekends and holidays the Pool Coordinators and Senior Pool Coordinators operate the control room without the on-site presence of any Senior management.

On October 7, 1992, the International Brotherhood of Electrical Workers, Local 455, AFL-CIO-CLC, (hereinafter "IBEW") filed a petition with the National Labor Relations Board (the "Board") seeking to be certified as the exclusive bargaining representative of certain individuals employed by NUSCO in the position of "dispatcher". The positions at issue were actually titled "Pool Coordinator" and "Senior

Pool Coordinator". The petition was withdrawn without prejudice and refiled on November 10, 1992. NUSCO opposed the petition based on the supervisory and managerial status of these positions. Pre-election hearings were held on November 23 and 24 and December 9 and 17, 1992. In a decision dated April 8, 1993, the Regional Director ruled that neither the Pool Coordinators nor the Senior Pool Coordinators were supervisors or managers and, accordingly, ordered an election. NUSCO filed a timely Request for Review which was rejected by the Board.

An election was held on May 11, 1993, which resulted in a vote in favor of union representation by the margin of one. The Union was certified as the bargaining agent based on the election. The IBEW then requested that NUSCO meet to bargain collectively regarding these employees, and NUSCO declined. On June 17, 1993, the IBEW filed a charge alleging that NUSCO unlawfully refused to bargain. The Board's General Counsel issued a Complaint and an Amended Complaint on this charge and successfully moved to transfer the case to the Board, which entered summary judgment over NUSCO's objection.

On December 30, 1993, NUSCO petitioned the First Circuit Court of Appeals to review the decision of the Board. Upon review, the First Circuit found that the individuals in question did not "responsibly direct" other employees as required of a statutory supervisor. Further, the Court found that despite the broad discretion they exercise in operating the power system, these employees were not "managerial" because they had no role in the creation or implementation of the operating procedures. Therefore, the First Circuit denied NUSCO's request that the Board's order be vacated.

REASONS FOR GRANTING THE WRIT

In upholding the Board's decision in this case, the First Circuit embraced a restrictive reading of the exclusions for supervisory and managerial employees that departs from the principles established by the Act as well as this Court's own decisions. Moreover, the redefinition of "supervisor" adopted by the First Circuit conflicts with the interpretation of that term that long has been accepted by the Circuit Courts of Appeal in the context of control room personnel in the public utility industry generally and in the electric power industry in particular. In order to resolve the conflict presented by the decision in this case, this Court's review is warranted.

Petitioner submits that the Pool Coordinators and Senior Pool Coordinators are either supervisory, managerial, or both. These individuals, three per shift, control the generation and dispatch of electrical power throughout the entire New England region. The NEPEX control room operates 24 hours a day, every day of the year, and with the exception of 8:30 to 4:30 Monday through Friday, no other management personnel are even present at the NEPEX facility. The Pool Coordinators and Senior Pool Coordinators independently determine which of some 300 generating units (including nuclear, fossil fuel and/or hydroelectric) will be used and at what levels. They independently buy and sell power from and to neighboring power Pools. They can and do cancel scheduled maintenance related equipment shutdowns. In order to accomplish each of their own responsibilities, these employees issue the directives that others follow --directives which either are relayed from the NEPEX control room through the satellite control centers to the personnel at the various generating stations, or are given face to face to others at the NEPEX facility.

Section 2(11) of the National Labor Relations Act ("the Act") defines the term "supervisor" as follows:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

This definition of supervisory status must be read in the disjunctive. As this Court has acknowledged, the existence of any one of the enumerated statutory criteria, regardless of the frequency of its use, is sufficient to confer supervisory status. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. -- (1994); *NLRB v. Magnesium Casting Co.*, 427 F.2d 114, 117 (1st Cir. 1970), aff'd 401 U.S. 137, 91 S.Ct. 599(1971).

The principal supervisory issue before the Board and the First Circuit in this case was whether the Pool Coordinators and Senior Pool Coordinators "responsibly direct" others while exercising "independent judgment." The First Circuit erroneously concluded that the Pool Coordinators and Senior Pool Coordinators are not supervisors because they are not "answerable" or "accountable" for the conduct of the satellite operators or other employees, or "ultimately responsible" for the

performance of the power system.[1] Although Petitioner contests the factual basis for such conclusions, the statute itself imposes no requirement that an individual be "answerable" or accountable" or "ultimately responsible" for the actions of others in order to qualify as a supervisor.

To the contrary, several Circuit Courts of Appeal have rejected the Board's determinations that individuals in positions nearly identical to those in dispute here were neither supervisors or managers. The courts in these cases did not expect or require the employers to produce evidence that the employees were "held accountable" for the action or inaction of the employees they directed, yet in every one of these cases the utility company control room personnel were ruled to be statutory supervisors. *See, e.g., NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923 (5th Cir. 1993), *Southern Indiana Gas and Electric Co. v. NLRB*, 857 F.2d 878 (7th Cir. 1981), *Monogohela Power Co. v. NLRB*, 657 F.2d 808 (4th Cir. 1981), *NLRB v. Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1978) and *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971). Indeed, some of these cases involved indirect supervisory relationships, in that directives were relayed to field personnel through other supervisors, and still the employers were not expected to prove that the supervisors in question were "held accountable" for the actions of those who were expected to follow their directives. "[T]he effective exercise of authority is nonetheless supervisory though it is passed on through another supervisory employee. Nor is it less supervisory power because it is couched in non-demanding terms." *Southern Indiana Gas and Electric Co. v. NLRB, supra*, at 883.

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[1] The court expressed the same conclusions with respect to both the directions given by the control room personnnel to those who normally work outside the NEPEX control center and directions given by the Senior Pool Coordinators to the Pool Coordinators.

In conflict with these decisions of the Fourth, Fifth, Sixth and Seventh Circuits, the First Circuit's decision in this case imposes a requirement that goes well beyond the statutory meaning of the phrase "responsibly to direct," particularly in the context of the electrical power industry in the United States. The New England Power Pool typifies the organizational evolution of this industry, the complexity of which has necessitated a degree of interconnection and interdependence that requires management on a regional basis. In each of the cases cited above, the control room personnel at operating utility companies have been held to be outside the scope of the Act. By virtue of the First Circuit's ruling in this case, the control room personnel at the power Pool level, who themselves issue the directions that are relayed through the control rooms of the operating companies, illogically are deemed to fall within the Act's coverage.

Beyond interposing the theoretical requirement that the Pool Coordinators be held accountable for the actions of others, the First Circuit leaves employers in the untenable position of having to prove a negative-- by producing evidence that directives were not followed and the supervisor in fact was held responsible. Nothing in the statutory language even remotely suggests that where, as in this case, individuals understand the hierarchy of authority and carry out the instructions given to them, their doing so somehow strips the person giving the instructions of their supervisory status. If that were true, the statutory phrase "responsibly directs" would be rendered meaningless.[2]

In *Health Care, supra*, this Court upheld the Sixth Circuit's rejection of another "false dichotomy" presented by

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2 The First Circuit's opinion in this regard also presents an apparent conflict with the line of cases holding that possession of supervisory authority confers supervisory status even if that authority has never been exercised. *See, e.g., Southern Indiana Gas and Electric, supra,* at 884.

the Board in an effort to support an overly broad interpretation of the Act. This Court found that nurses who otherwise exercised supervisory functions in carrying out patient care responsibilities were acting in the interest of their employer as required in order to qualify as a statutory supervisor. Here, as in *Health Care*, the Board again seeks to superimpose conditions on "supervisory" status that are unwarranted in light of the statutory language and which, in the context of the complexity of the NEPEX operation, strain not just that statutory language but also common sense.

In its analysis in the *Health Care* case, the Court also emphasized that individuals who responsibly exercise independent judgment in the interest of their employer may well qualify either as supervisory employees or as managerial employees, another category excluded from the coverage of the Act. *See also, NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Petitioner submits that the employees at issue in this case also meet the "managerial" test for exclusion from the Act.

With regard to the managerial status of the Pool Coordinators and Senior Pool Coordinators, the First Circuit acknowledged that under this Court's decisions managerial employees include those who take or recommend "discretionary actions that effectively control or implement employer policy," App. A10, quoting *Yeshiva*, at 683. In this case, however, the Board and the First Circuit effectively have eliminated any impact of the phrase "or implement" from this Court's language in *Yeshiva*.

According to the Board, the mere existence of fourteen (14) written operating procedures, regardless of the complexity of the New England electrical system, precludes these employees from managerial status. These operating procedures provide general guidelines to Pool Coordinators with respect to priorities in the event of unusual or emergency system operating conditions. These fourteen

operating procedures do not begin to cover the multitude of operational situations that require independent decisions and actions on the part of the NEPEX control room personnel, and on their face these procedures reserve substantial discretion to the Pool Coordinators and Senior Pool Coordinators with respect to the areas that they do address.

The First Circuit upheld the Board on this point, despite uncontested evidence that Pool Coordinators and Senior Pool Coordinators make decisions on a daily basis, without either reference to policies or consultation with Senior management, that have major consequences to the public and to New England's public utilities. These consequences broadly impact the safety and security of the power system, and have financial consequences in the magnitude of tens of millions of dollars annually. According to the Court, the operating procedures constitute the sole policy of this employer, and unless these employees effectively can dictate that policy, they cannot qualify as "managerial."

As recognized by this Court in *Yeshiva*, and the cases cited therein, individuals who carry out employer policy through independent decision-making in matters of central importance to the employer's operations fall within the managerial exclusion from the Act. Those decisions, in the words of the Court, may either control or "implement" employer policy. Decisions regarding which generating stations will be used and to what extent, whether or not to purchase or sell power, whether to proceed with scheduled power outages as well as how to react to emergency losses of generation could not be more central to the implementation of NEPEX policy and purpose. By requiring that these employees have control over the very issuance of policy, the Board and the First Circuit in this case once again have overstepped the guidelines established by this Court and created an issue that must be resolved.

For all of the foregoing reasons, the First Circuit's ruling in this case conflicts with the rulings of several other courts of appeal, and also contradicts principles established by this Court with respect to both supervisory and managerial status under the Act. In support of its petition for review, Petitioner respectfully urges that the Court also recognize that the issues involved extend well beyond the factual parameters of this particular case. As noted above, the New England Power Pool is only one of several similar Pools operating throughout the United States. The employees at issue are those who oversee and direct the operations throughout the entire power Pool in order to safely and efficiently manage the power system.

These employees sit at the apex of the operational pyramid of the power Pool, and their directions are relayed through satellite control centers and/or operating company control rooms to employees throughout the power system. The individuals who receive and carry out these instructions in the operating company control rooms, again as noted previously, have been deemed supervisors under the Act in a long line of cases from other circuits. If this Court permits the First Circuit's decision to stand, this entire line of cases arguably will have been overruled *sub silentio*, and the Board can seek to confer "employee" status on control room personnel throughout the country.

In addition, contrary to the First Circuit's opinion with respect to managerial status, the convergent interests of the employees and management in this situation relate to much more than simply "keeping the lights on." Millions of residents are dependent upon the uninterrupted operation of the power Pool not just for light but also for heat, water, mass transit, transportation safety and a full panoply of both routine and emergency services. How efficiently the power Pool is operated likewise affects these same millions of people financially. Under the circumstances, the collective efforts of these employees and more Senior management in

implementing the employer's policies is critical not only to the interests of the employer but also to the interests of the general public.

CONCLUSION

For the reasons set forth above, NUSCO requests this Court issue a writ of certiorari to the First Circuit.

Respectfully Submitted

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APPENDICES

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APPENDIX A

United States Court of Appeals, for the First Circuit.

No. 94 - 1006

NORTHEAST UTILITIES SERVICE CORPORATION,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

International Brotherhood of Electrical Workers, Local 455, AFL-CIO-CLC,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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(September 20, 1994)

Before SELYA and CYR, Circuit Judges, and ZOBEL[1], District Judge.

ZOBEL, District Judge. Northeast Utilities Service Corporation (the "Company") petitions for review of a final order of the National Labor Relations Board (the "Board").

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1 Of the District of Massachusetts, sitting by designation.

The Board cross-applies for enforcement of that order[2], pursuant to sections 10(e) and (f) of the National Labor Relations Act (the "Act"), 29 U.S.C.A.s 160(e), (f) (West 1973). The only issue before this Court is whether the Board had substantial record evidence to conclude that certain of the Company's employees, known as Pool Coordinators ("PCs") and Senior Pool Coordinators ("SPCs"), are neither "supervisors" within section 2(11) of the Act nor managerial employees and therefore may constitute a collective bargaining unit.

I.

International Brotherhood of Electrical Workers, Local 455 (the "IBEW"), filed a petition with the Board seeking to be certified as exclusive collective bargaining representative of the PCs and SPCs. The Company opposed the petition on the ground that these employees were exempt from the Act because of their supervisory and managerial status. Based on evidence presented at preelection hearings, the regional director found that neither PCs nor SPCs were supervisors or managers. Accordingly, she directed an election. The Company filed a timely "Request for Review" which the Board rejected as raising no substantial issues warranting reconsideration.

The IBEW prevailed in the election held May 11, 1993, whereupon the regional director certified it as the collective bargaining representative of the PCs and SPCs. The Company declined the IBEW's subsequent request to bargain collectively; it still insisted that the PCs and SPCs were supervisors and managers exempt from the proposed

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2. The Board's November 24, 1993, Decision and Order is reported at 313 N.L.R.B. No. 65 (Nov. 24, 1993). It rests on findings issued April 8, 1993.

bargaining unit. On June 17, 1993, the IBEW filed an unfair labor practice charge. The Board's general counsel then issued a complaint and amended complaint on the charge that the Company refused to bargain in violation of section 8(a)(1) and (5) of the Act, 29 U.S.C.A.s 158(a)(1), (5) (West 1973). He subsequently moved to transfer the proceedings to the Board and for summary judgment. On November 24, 1993, the Board granted the motion, as it found no new evidence or special circumstances that would cause it to reexamine its representation decision. It therefore concluded that the Company's refusal to bargain violated the Act.

II.

In the late 1960s New England's electric utilities created the New England Power Pool ("NEPOOL") to centralize control of the region's power supply. NEPOOL is an association of roughly one hundred utility companies in the six-state region, which in turn operate approximately three hundred power generating plants. NEPOOL is divided into three divisions, NEPOOL billing, which manages transactions within the system; NEPLAN, which forecasts future power needs; and NEPEX, which controls daily power generation and transmission.

The Company is responsible for staffing each division pursuant to a service contract with NEPOOL. All support functions are provided by the Company as well, including personnel management, accounting and purchasing. Vacation schedules, exempt payment plans, hiring, evaluation and firing practices are uniformly prescribed by the Company throughout NEPOOL's divisions. Thus, every employee of a NEPOOL operating division is an employee of the Company.

NEPEX in Holyoke, Massachusetts, is the master dispatch and control center for bulk power throughout New England. It regulates the day-to-day production, sale and purchase of

power by each of the approximately three hundred NEPOOL member utilities. Because of the complexity of this task, NEPEX does not communicate directly with each of the component power plants, but instead relays instructions through four "satellite" operations. The satellites are regionally organized: Rhode Island, Eastern Massachusetts and Vermont are within the "REMVEC" satellite; Connecticut and Western Massachusetts within the "CONVEX" satellite; New Hampshire and Maine each has its own satellite organization. CONVEX employees are also employees of the Company but the other satellites are independently staffed.

III.

The employees at issue work in the NEPEX control room, the nerve center of all NEPEX operations. The PCs and SPCs (collectively "Coordinators") are responsible for buying and selling power among the member utilities as economically as possible while avoiding power outages. They decide which plants will operate at what times and at what power levels. They set and implement maintenance schedules for both generating plants and transmission elements. If control room equipment should need repair or maintenance, they may order those services from the plant's engineers, in accordance with priorities set in one of fourteen "Operating Procedures" promulgated by NEPOOL to guide the Coordinators in their several responsibilities.

The control room is in constant operation; the Coordinators work in teams of three--one SPC and two PCs--in twelve-hour shifts. During "business hours," from 8:30 a.m. to 4:00 p.m. on weekdays, a supervisor and assistant supervisor of control room operations also work at the plant; at all other times they are on call. They audit and formally evaluate the Coordinators' overall performance, sometimes with input from the SPCs. During nonbusiness hours, the PCs and SPC are the only employees on duty.

The PCs alternate each shift between two positions, the "generation/load" PC and the "transmission/security" PC. The generation/load PC buys and sells "contract" and "economy" power from all member and nonmember plants, and reserves enough unused capacity to ensure continued operation in the event that the largest single generator shuts down.

The transmission/security PC monitors the New England bulk power system, prepares for power coverage in the event of a plant shutdown, and has final authority to approve or disapprove transmission outage applications. This employee also has the authority to dispatch power uneconomically if such dispatch contributes to overall system reliability. Further, the transmission/security PC monitors the system to prevent cascading, that is, to ensure that no single transmission element in the system overloads any other transmission element. Ultimately, the security PC may direct limited power outages by reducing voltage or "shedding load" to prevent a more widespread blackout.

The SPC's duties are similar to those of the PCs', but rather than looking at the system's minute-to-minute requirements, the SPC forecasts the system's needs from several hours to one day in advance. Witnesses for the Company testified the SPC is "in charge" of the shift. As the more experienced employee in the control room, the SPC may attempt to moderate disputes between the generation/load and transmission/security PCs but there was no evidence that the SPC gave orders or instructions. On the contrary, the record suggests that the SPC is too busy with his/her own duties to oversee the PCs' work. Except for informal discussions with the control room supervisor, the SPC does not evaluate PCs' performance and is not responsible for discipline, termination of employment, or for approving time sheets or leave. During nonbusiness hours, if a PC cannot report to work, the

SPC contacts a shift replacement from a preexisting "spares" list.

Although NEPEX PCs and SPCs are paid at a higher salary grade than satellite operators, they have no authority to hire, fire, evaluate or promote satellite employees. Should a satellite operator refuse to comply with NEPEX instructions, the PC or SPC would not have the power to discipline or recommend discipline. Instead, the NEPEX coordinator would relate the incident to NEPEX upper management who would contact upper management at the satellite and attempt to resolve the matter.

Both PCs and SPCs have substantial authority with respect to NEPEX's day-to- day functions, but even in this respect their discretion is limited by the directives in fourteen NEPEX Operating Procedures. The Procedures define the broad parameters to be followed as the PCs and SPCs conduct the dispatch. However, not every facet of every procedure is dictated by the Operating Procedures and Coordinators are often expected to rely upon their own knowledge, skills and experience to make the system work.

IV.

Supervisors are excluded from the Act's definition of "employees" and hence may not be included in a bargaining unit designated by the Board. 29 U.S.C.A. ss 152(3), 159(b) (West 1973). Section 2(11) of the Act, 29 U.S.C. s 152(11), defines a "supervisor" as

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or

clerical nature, but requires the use of independent judgment.

The statute is read in the disjunctive, "with the existence of any one of the statutory powers sufficient to confer supervisory status regardless of the frequency of its exercise." *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 360 (1st Cir.1980); *NLRB v. Magnesium Casting Co.*, 427 F.2d 114, 117 (1st Cir.1970), aff'd on other grounds, 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed.2d 735 (1971).

We are especially deferential to the Board's determination of supervisory status because we recognize the Board's competence and experience in applying the Act to the complexities of industrial life. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 1149-50, 10 L.Ed.2d 308 (1963); Maine Yankee, 624 F.2d at 360. Further, the "infinite and subtle gradations of authority" existing in the workplace entitle the Board to wide latitude in determining which employees fall within the definition of "supervisor." *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 179 n. 6, 82 S.Ct. 1237, 1240 n. 6, 8 L.Ed.2d 418 (1962); *Goldies, Inc. v. NLRB*, 628 F.2d 706, 710 (1st Cir.1980). Our deference is not unlimited, however; we will only affirm the Board's decision if it is supported by "substantial evidence," drawn from the totality of the record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951); Maine Yankee, 624 F.2d at 360.

The Company concedes that the PCs and SPCs have no authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." Instead, it contends that the Coordinators are supervisors because they "responsibly ... direct" CONVEX satellite employees and NEPEX engineers, and the exercise of that authority requires the use of independent judgment.

PCs and SPCs are unquestionably highly trained employees who use independent judgment to make and implement complex technical decisions that affect the entire region's power supply. They do not, however, "responsibly ... direct" other employees within the meaning of the statute. "To be responsible is to be answerable for the discharge of a duty or obligation." Maine Yankee, 624 F.2d at 361 (quoting *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), cert. denied, 338 U.S. 899, 70 S.Ct. 249, 94 L.Ed. 553 (1949)). The uncontroverted evidence established that the PCs and SPCs are not answerable for the conduct of satellite operators. The NEPEX coordinators are permitted merely to report CONVEX employee failures to NEPEX upper management, and it is upper management at the satellite that is ultimately responsible for the actions of CONVEX operators. By the same token, although PCs and SPCs use independent judgment within the guidelines of the Operating Procedures to determine whether and when to direct engineers to service control room equipment, there is no evidence that they answer for engineering or equipment failures.

The Company maintains that the SPCs, as the senior employees in the control room during nonbusiness hours, also supervise PCs. However, its assertion that SPCs were in "charge of the shift" in the control room supervisor's absence, is also not supported by the evidence. Nothing in the record suggests that they had ultimate responsibility for the plant's performance during nonbusiness hours, in fact the record notes that a supervisor is always on call. Moreover, SPCs do not evaluate PCs' performance, although the control room supervisor may request SPCs' input. SPCs do not have authority to hire or to assign work; only as a matter of routine may they fill an open shift from a preexisting list. If the SPCs moderate disputes, the outcome is not ultimately their responsibility. Finally, and most importantly, SPCs are simply not held accountable if a PC disobeys a direct order, misquotes a price or causes a blackout.

Petitioner relies heavily on *Maine Yankee*, 624 F.2d at 347, in which we reversed the Board's determination that a power plant's Shift Operating Supervisors ("SOSs"), who had duties similar to those of the Coordinators here, were not supervisors under the Act. Its reliance is misplaced. In that case we found that the SOSs did responsibly direct other employees because "should anything go wrong with respect to the plant's electric power output, '[the SOS] is the one that would have to answer why.' " Id. at 361. The Coordinators in this case may direct CONVEX operators, but they are not responsible for what the satellite employees actually do. Further, in *Maine Yankee*, the Board ignored or depreciated evidence that the SOSs used independent judgment in their direction of other employees. Here the Board implicitly recognized that the Coordinators are highly trained employees with substantial discretion, within the Operating Procedures, to instruct other employees. The Board, however, refused to take the further step of concluding that PCs and SPCs were responsible for other employees' actions, and in that, we conclude, it was correct.

V.

The Company also argues that PCs and SPCs are managerial employees and therefore exempt. The Act itself does not explicitly exclude managers, but they have been excluded by judicial interpretation because managers' interests are so aligned with the interests of the employer that managers cannot be deemed employees for the purposes of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283-89, 94 S.Ct. 1757, 1766-69, 40 L.Ed.2d 134 (1974). Managers are defined as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *NLRB v. Health Care & Retirement Corp.*, *--- U.S. ----, ----*, 114 S.Ct. 1778, 1782, 128 L.Ed.2d 586 (1994) (quoting Bell Aerospace, 416 U.S. at 288, 94 S.Ct. at 1768); *Boston Univ. Chapter, Am. Ass'n of Univ. Professors*

v. NLRB, 835 F.2d 399, 400 n. 3 (1st Cir.1987). Generally, employees may be excluded from a bargaining unit on the basis of managerial status only if they "represent [ ] management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *NLRB v. Yeshiva University*, 444 U.S. 672, 683, 100 S.Ct. 856, 862, 63 L.Ed.2d 115 (1980).

The Company's argument is unpersuasive given the paucity of evidence tending to show managerial powers in the PCs or SPCs. Management policy at NEPEX is embodied in the Operating Procedures formulated by the Operations Committee. There is no evidence that PCs or SPCs have a role in the creation or implementation of the Operating Procedures. Certainly the Coordinators may sometimes depart from the Procedures, but they do not have the authority to issue new ones. Finally, at the core of the managerial question is the alignment of workers' and employer's interests. Other than the common goal of keeping the lights on, the record shows no such congruence of interests between the Company and the Coordinators sufficient to warrant the latter's exemption from the Act.

VI.

It is the function of this Court to review the Board's decision in accordance with the "substantial evidence" test. It is the Board's "primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor.' " *Interlake S.S. Co.*, 370 U.S. at 179 n. 6, 82 S.Ct. at 1240 n. 6. The Board undoubtedly had substantial evidence on the record as a whole to conclude that the PCs and SPCs did not meet the current definition of "supervisors." However, when the Board and the courts set upon the task of defining a supervisor for the purposes of the statute, neither contemplated the type of quasi-professional, quasi-overseer employee encountered in this case and others

in the public utilities setting. It may profit the Board to reexamine its views in this field.

The Company's petition for review is denied and the Board's application for enforcement of its order is granted. Affirmed.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Case 1-CA-30615

Northeast Utilities Service Company

and

International Brotherhood of Electrical Workers, AFL-CIO, CLC

(November 24, 1993)

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On July 14 and August 24, 1993, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing and amended complaint and notice of hearing, respectively, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 1-RC-19907. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint. On

November 5, 1993, the General Counsel filed a Motion to Transfer Proceeding to the Board and for Summary Judgment, with exhibits attached. On November 9, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[3] On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a subsidiary of Northeast Utilities, a corporation with an office and place of business in Holyoke, Massachusetts, has been engaged in the business of providing administrative support to utilities and collectives that buy and sell electric power. During the calendar year ending

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[3] Member Raudabaugh notes that he did not participate in the representation case proceeding.

December 31, 1992, the Respondent, in conducting its business operations, derived gross revenues in excess of $250,000 and purchased and received at its Holyoke facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held May 11, 1993, the Union was certified on May 20, 1993, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time senior pool coordinators and pool coordinators employed by Northeast Utilities Service Corporation at the NEPOOL facility in Holyoke, Massachusetts, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since May 25, 1993, the Union has requested the Respondent to bargain and since June 7, 1993, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after June 7, 1993, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir.1965).

ORDER

The National Labor Relations Board orders that the Respondent, Northeast Utilities Service Company, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Electrical Workers, AFL--CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time senior pool coordinators and pool coordinators employed by Northeast Utilities Service Corporation at the NEPOOL facility in Holyoke, Massachusetts, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

(b) Post at its facility in Hartford, Connecticut, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

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4 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

James M. Stephens
Chairman

Dennis M. Devaney
Member

John Neil Raudabaugh
Member

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, AFL--CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time senior pool coordinators and pool coordinators employed by us at the NEPOOL facility in Holyoke, Massachusetts, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
FIRST REGION

In the Matter of	*	
THE NEW ENGLAND POWER POOL AND NORTHEAST UTILITIES SERVICE CORPORATION	*	
Employer[1]	*	
and	*	CASE 1-RC-19907
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC	*	
Petitioner	*	

ORDER

Employer's Request for review of the Regional

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1 The name of the Employer appears as amended at the hearing.

Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[2]

JAMES M. STEPHENS, CHAIRMAN
DENNIS M. DEVANEY, MEMBER

Member Oviatt, dissenting:

I would grant the Request for Review.

CLIFFORD R. OVIATT, MEMBER

Dated, Washington, D.C., May 11, 1993.

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2 The only issues raised in the request for review were whether the Regional Director erred in finding that the Employer's Senior Pool Coordinators and Pool Coordinators were neither supervisors within the meaning of Sec 2(11) of the Act nor managerial employees.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of	*	
THE NEW ENGLAND POWER POOL AND NORTHEAST UTILITIES SERVICE CORPORATION	*	
Employer[1]	*	
and	*	CASE 1-RC-19907
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC	*	
Petitioner	*	

DECISION AND DIRECTION OF ELECTION

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1 The name of the Employer appears as amended at the hearing.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.[2]

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[2] By letter dated December 21, 1992, Northeast Utilities Service Corporation requested that an administrative investigation with respect to the Petitioner's showing of interest be conducted based upon the alleged participation of the senior pool coordinators, whom it is alleged are statutory supervisors, in gathering the showing. In light of my determination here that the senior pool coordinators are not statutory supervisors, there is no basis upon which to question the adequacy of the showing of interest.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The New England Power Pool, herein NEPOOL, was formed in 1971 and is an association of approximately 100 electric utilities which operate in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island. It operates approximately 300 generating plants with a capacity of 25,000 megawatts. These plants are nuclear, oil, coal, and gas thermal units; internal combustion units, and hydroelectric units. The power they generate is transmitted over 7,000 miles of transmission lines. NEPOOL is interconnected with the New Brunswick Electric Power Plant Corporation, which is the power system for the province of New Brunswick, Canada; Hydro Quebec, which is the power company for the Canadian Province of Quebec; and the New York Power Pool, a similar association of utilities in New York State. NEPOOL purchases and sells power to all these entities, and through them to other, more distant operations.

It is the function of NEPOOL to regulate the production, sale, and purchase of power by its members in order to deliver power in the most efficient fashion and to avoid power outages.

Pursuant to its operating agreement, NEPOOL has complete authority over all NEPOOL members regarding generation and transmission of power.

To administer this system, NEPOOL created three divisions: NEPOOL Billing, which is a centralized billing process for all transactions involving the member utilities; NEPLAN, which handles planning responsibilities involving the forecasting of future power needs; and NEPEX, which handles the actual day-to-day operation of the system. NEPOOL entered into a service contract with Northeast Utilities Service Corporation, herein Service, to staff these various divisions and to provide it with all necessary support functions such as personnel, treasury, accounting, and purchasing. Service is a wholly-owned subsidiary of Northeast Utilities, a holding company that does not directly employ any employees. Northeast Utilities is also the holding company for the Connecticut Yankee Atomic Power Company, Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, Northeast Nuclear Energy Company, Public Service of New Hampshire, and North Atlantic Energy Service Company, all of whom are members of NEPOOL. Service also provides various levels of administrative services to these other subsidiary companies of Northeast Utilities.

By the terms of its agreement with NEPOOL, Service agreed, in return for certain compensation, to lease equipment and real estate on behalf of NEPOOL and to use its (Service's) employees to provide the workforce necessary to staff the NEPOOL Billing, NEPLAN, and NEPEX operations.

Pursuant to that agreement, Service secured a facility in Holyoke, Massachusetts, equipped it, and staffed it with its own employees. It presently employs approximately 130 employees at this location,

of which 37 are assigned to NEPOOL Billing, 30 to NEPLAN, and 63 to NEPEX.

The Petitioner seeks a unit of 18 NEPEX employees, consisting of 6 senior pool coordinators (spc's) and 12 pool coordinators (pc's), whom it contends are jointly employed by NEPOOL and Service at the Holyoke facility, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act and all other employees. NEPOOL and Service both contend, contrary to the Petitioner, that they are not joint employers of the employees in question, but rather, that Service is the sole employer. They do not contest the scope of the unit. They do contend, however, again contrary to the Petitioner, that the spc's and pc's are supervisors within the meaning of Section 2(11) of the Act, and managerial employees, as well, and that the petition should be dismissed on this basis. There is no history of collective bargaining among the petitioned-for employees.

NEPOOL is headed by a 10 person executive committee consisting of the chief executive officers of the eight major utility company members of NEPOOL, one representative for all of the smaller utilities, and one representative for the public utilities. It sets the overall policies and procedures for NEPOOL. It also oversees and approves its annual operating budget. Under this committee are two subcommittees: the policy planning subcommittee, which oversees the planning functions for future power needs, and the operations subcommittee, which oversees operations and billing. The operations subcommittee consists of those vice presidents with expertise in the operational area from

each of the various entities represented on the executive committee. The operations subcommittee determines the operating procedures under which the system functions, such as the level and type of electrical power reserve that must be available at all times. Both the executive committee and the operations subcommittee have participated in the interviewing and decision-making process with respect to individuals who were hired by Service for executive level positions in the NEPOOL operation. NEPOOL itself has no day-to-day supervisory presence at the Holyoke facility.

Philip Oatness is the executive director of NEPOOL. He reports directly to its executive committee. As with all of the individuals working at the Holyoke facility, he is an employee of Service. None of these individuals is an employee of NEPOOL. There are three NEPOOL directors, one for each of the three divisions -- NEPOOL Billing, NEPLAN, and NEPEX. Russ McEacharn is the director of NEPEX. HE and the other two directors report to Oatness. James Ginnetti is the manager of the NEPEX Operations. He reports to McEacharn. There are three NEPEX supervisors who are in charge, respectively, of forecasting, transmission applications, and control room operations. Steven Rourke is the supervisor of control room operations. He and the other two supervisors report to Ginnetti. Rourke is presently on a temporary assignment to a NEPOOL planning committee. Jack McGuinness, the control room operations assistant, is the acting supervisor. The assistant's position is presently unfilled. The petitioned-for employees report directly to Rourke and McGuinness. The parties agree, and I find that, based on the control they exercise over spc's and pc's in the director of their work and evaluation of their

performance, the supervisor of control room operations and the control room operations assistant are supervisors as defined in the Act, as are the executive director of NEPOOL, the three NEPOOL directors, and the manager of NEPEX Operations -- al of whom are above them in the NEPOOL chain of command.

NEPEX's Holyoke facility is the master control center for the NEPOOL operation. The spc's and pc's operate the control system, which relays instructions from NEPEX, through four satellite operations, to the various generation and transmission sites. This intermediate layer of control (the satellite operations) is necessary because the system is too large to be directly controlled. Accordingly, all members of NEPOOL must also be members of a satellite. Each satellite is operated by an association of its member companies. The satellites are located in Southington, Connecticut; Augusta, Maine; Manchester, New Hampshire; and Westborough, Massachusetts.

The Southington satellite is operated by Convex, the Connecticut Valley Electrical Exchange. It dispatches power to Connecticut and Western Massachusetts. It also provides a backup control function for NEPEX. In case of emergency, the NEPEX control system can operate through and out of the Convex facility. The Augusta satellite dispatches for Maine, the Manchester satellite dispatches for New Hampshire, and the Westborough satellite, REMVEC, dispatches for Rhode Island, Eastern Massachusetts, and Vermont.

The satellite control rooms are staffed by individuals whose job duties are similar to those of the

spc's and pc's. When they receive a directive (i.e., an instruction) from an spc or pc, they may carry out the directive in different ways. They have the capability to carry out some of the directives themselves, from their own control room. The vast majority of the directives, however, are transmitted by them to the generation or transmission site, either directly, or indirectly through another similar control center operated by the individual utility.

Each of the satellites is set up in a manner similar to that of NEPOOL. They each have an operating committee made up of representatives of their members that oversee their operations in a similar fashion to the NEPOOL operating subcommittee.

The Convex satellite is staffed by employees of Service. Service provides the employees pursuant to a contract with the various member companies, except that it has no written agreement with those Convex members that are subsidiaries of Northeast Utilities. The Augusta and REMVEC satellites are staffed by individuals who are not employees of Service. The Manchester facility is staffed by employees of Public Service of New Hampshire, a Northeast Utility subsidiary.

The spc's and pc's must have substantial experience and training in order to be selected for their positions, which were analogized in the record to that of an air traffic controller. Their salary range is higher than that of individuals performing similar tasks for the satellite operations. This differential is based on the

spc's and pc's higher level of responsibility. They do not receive any special benefits.[3]

As noted above, the spc's and pc's work in a control room located in the Holyoke facility. This room operates on a 24 hour a day, 365 days a year schedule. The supervisor and assistant supervisor of control room operations work from 8:30 a.m. to 4:00 p.m., Monday through Friday. They and/or other management level employees are available on an on-call basis at all times. The spc's and pc's work in teams of three, consisting of one spc and two pc's, one of whom serves as loading coordinator (herein loading pc), while the other serves as transmission and security coordinator (herein security pc). They work 12 hour shifts from 7:00 a.m. to 7:00 p.m. This is done on a rotating schedule.

The spc is in charge of the shift. It is his primary responsibility to overview all of the developments which the pc's handle on a minute-to-minute basis so as to monitor the "big picture" of how conditions are likely to develop over the entire shift. This position was added because the proliferation of assignments made it difficult for the two pc's to do anything but concentrate on their immediate duties. The spc has the authority to resolve disagreements between the loading pc and the security pc regarding the operation of the system. If a pc does not follow the

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[3] At one time Service provided its supervisory level employees with a $50,000 disability insurance policy. This was also provided to the spc's and pc's. It is unclear when this benefit ceased, but it was clearly not in effect as of the date of the hearing.

instructions of an spc, the spc would report this to the supervisor. Such a refusal has never occurred. The spc's are consulted by the supervisor as part of the evaluation process of the pc's, but there is no record evidence that such evaluations are in any way based on the spc's oral comments. If an spc or pc is going to be absent or late they must contact either the supervisor, the assistant, or someone above them in the chain of command. The spc on duty would then use a list of "spares," employees who are available to work, to secure a replacement. Until a replacement is secured, the affected pc or spc on the current shift must remain at his station.

The job description of the spc position reads as follows:

> 1. Coordinate Pool Coordinators' shift operations to promote consistent application of NERC Operating Guides; NPCC Operating Procedures; NEPEX Operating Procedures;[4] NEPEX Criteria, Rules and Standards; and other established guides and instructions.
>
> 2. Directs the Loading and Security positions in the correction of violations to operating procedures and practices.

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[4] There are 14 NEPEX Operating Procedures that the spc's and pc's must normally follow in carrying out their duties. These procedures, which are discussed in detail below, deal with every area of these duties and provide the spc's and pc's with specific instructions, guidelines, and controls concerning their operation of the system.

3. Concentrates efforts on the scheduling and pricing of interchange transactions, adjustments to generator commitment/decommitment schedules, revisions to water management schedules, etc.

4. Issues approval to Loading and Security positions to take emergency actions.

5. Make final determination of actions to be taken in the event of conflicts between Loading and Security positions.

6. Instructs Pool Coordinators in the application of new or revised operation procedures or instructions.

7. Recommends practices and procedures to improve the effectiveness of NEPEX operations.

8. Communicates with NEPEX supervision concerning abnormal operating situations.

When assigned to the Outage Application position, performs the following duties:

9. Concentrates efforts on analyzing and granting approval to transmission equipment outage requests.

10. Assures that appropriate operating reliability criteria can be maintained during planned transmission outages.

11. Coordinates planned transmission equipment outages with Satellites and neighboring pools.

The pc's alternate on a daily basis between the loading coordinator position and the transmission and security coordinator position. The job description for the pc position reads as follows:

1. Supervises and coordinates the functions of the four Satellite control centers.

2. Supervises the actual dispatch of all NEPOOL generation and transmission facilities.

3. Administers real-time control over the water resources of the Connecticut and Deerfield Rivers including pumped storage plants and revises water management plans as required.

4. Establishes hourly interchange schedules with adjacent AC interconnected electric system.

5. Monitors energy flow between New England and adjacent interconnected electric systems and takes corrective action.

6. Coordinates power imports from Hydro-Quebec and the real-time dispatch of the DC interconnected electric systems.

7. Administers generator start-up and shut-down schedules.

8. Ensures that the operations computer data base, entered at NEPEX and the Satellites, is updated regularly.

9. Conducts studies to determines the level of reliability of the New England bulk power transmission system.

10. Prepares plans to cope with possible or projected contingency conditions.

11. Monitors energy flows and voltages in neighboring pools and acts to protect neighboring pools from detrimental effects of major New England contingencies.

12. Determines the need for and orders the arming of special protection systems.

13. Administers and classifies generator maintenance outages within the Optimized Daily Forecast (ODF) period.

14. Analyzes and grants approval to transmission equipment outage requests.

15. Assures that dispatch conforms to NEPEX Operating Procedures and NEPEX Criteria, Rules, Standards.

16. Disseminates appropriate information on New England bulk power supply system to the Satellite control centers.

17. Maintains an official NEPEX log of system operations.

18. Revises predictions of NEPEX loads and reruns the ODF as necessary.

19. Utilizes sophisticated central computer and microprocessor hardware and software facilities and communication equipment required for the dispatch of the New England bulk power supply system.

20. Grants approval of maintenance outages of NEPEX and Satellite operations computers and communications facilities.

21. Administers capacity and energy contracts between NEPOOL participants and adjacent pools on an hourly basis.

The loading pc is in charge of the generation and transmission functions, as well as the buying and selling of power. His use of hydroelectric power, both from dams and pump storage generating plants, must take into account not only the economy of generation, but also the other uses to which the rivers are

put. He is also responsible for maintaining the "operating reserve" or "first contingency reserve." The reserve requires that sufficient excess generation be maintained on line to be able to replace the loss of the largest single generation plant within ten minutes. His function is to ensure that there is sufficient power available to satisfy the current load plus the necessary reserve, but not more than what is necessary, as it is uneconomical to generate an excess reserve.

The loading pc operates with the aid of a computer and telemetered information. This enables him to monitor not only the current "load," or required level of power, but also the trend of the load, and to determine on a minute-to-minute basis how much, as well as what mix of, generation is necessary and what buying and/or selling of power needs to be administered in order to meet that load. The loading pc accomplishes this by giving directives to the generation and transmission operators through the satellites and by entering into agreements with other power systems to buy and/or sell power.

The cost of power is the loading pc's primary concern in his selection of what type of power to generate or whether to purchase power from another system. The various types of power at his disposal are assigned a cost factor. He does not determine this factor. His job is simply to operate the system with the lowest cost power available. This means that he may purchase power from another system if it is available at a lower cost than NEPOOL can generate power at. Likewise, he may sell excess power he has available to another system if it is profitable to do so. In making these decisions he must also consider that the power, whether

generated or purchased, must be capable of being transmitted to where in the system it is needed and that the operating reserve must be maintained.

Contracts for the purchase and sale of power are between the two participating utilities, but are administered by NEPEX pursuant to the NEPOOL agreement. There are two types of contracts. One is a "must take" contract under which NEPOOL has committed to purchase a certain amount of power at a prearranged price. The other type of contract is a "dispatchable" contract where the power is available and the loading pc must decide whether to take it or not. The dispatchable contracts run on an hourly basis and are made between the loading pc and his counterpart in the other system. Once the contract is undertaken NEPOOL is obligated to buy the power. This type of contract is also referred to as "economy power." This phrase is used to describe a transaction in which the loading pc either agrees to purchase excess power from another system at a rate lower than NEPOOL can produce it, or where the loading pc sells excess power NEPOOL has available for more than the cost to NEPOOL of generation.

The loading pc determines how much power to purchase or sell based on a price differential. He determines the cost of the power with the aid of a computer program. The program provides him with a sale or purchase price for a certain block of power. If he is of the opinion that the price arrived at by the computer is not accurate, he can do his own calculations based on certain set prices for various types of power the system can generate. If the loading pc varies from the price set by the computer, he must make an entry in his log to

reflect this. These purchases and sales can involve savings to NEPOOL of hundreds of thousands of dollars in a single transaction and millions of dollars on an annual basis.

The security pc performs an ongoing contingency analysis of the entire system, including the monitoring of the high voltage transmission system. He also determines outage applications and monitors the possible loss of the Hydro-Quebec power connection.

On a regular basis, the security pc will direct the generation of uneconomic power in order to maintain the integrity of the system. In an emergency situation he can take what is referred to as "drastic action" up to and including loadshedding. Loadshedding is the curtailment of all power in certain areas. This causes a series of small, short-term blackouts and is done to avoid a larger, more lengthy loss of power. The security pc also monitors the system to make sure "cascading" does not take effect. Cascading occurs when one line or transmission element not only goes out of service, but also overloads other lines or transmission elements and causes them to fail.

The security pc also has the authority to approve outage requests. An outage occurs when a utility requests permission to shut down a generation source in order to perform maintenance work on it. The security pc can disapprove the request if he believes it threatens the integrity of the system. He can also cancel permission if conditions change subsequent to an approval of the request. This can, and has, caused the cancellation of scheduled maintenance by member utilities.

As noted above, the spc's and pc's carry out certain of their tasks by giving instructions to their counterparts at the four satellites. If the satellite employee is resistant to, or slow in complying with, the instruction, the spc or pc will note this in his log and will report it to the control room operations supervisor. The supervisor, either directly or through higher level management officials, will contact the satellite employee's supervisor to discuss the matter. Neither the spc's, nor the pc's, nor any member of NEPOOL management has any authority or control over the satellite employees. There is no record evidence of any satellite employee's status having been affected by a report or inquiry from NEPEX. A direct refusal to follow instructions has never occurred.

The spc's and pc's can contact the NEPEX engineering department directly if they need equipment repaired or serviced. An on-call engineering department employee is always available for such work. The schedule by which the equipment will be repaired or serviced, i.e., immediately, next working day, or within 24 hours, is determined by NEPEX Operating Procedure 2, which categorizes the various types of equipment according to the immediacy of the need to repair them. If the spc or pc believes that the response by the engineering department is not satisfactory, he reports this to the control room supervisor, who will then discuss the situation with the engineering department supervisor and/or higher level of management. Neither the spc's nor the pc's have any direct control over engineering department employees. There is no record evidence of any engineering department employee's

status having been affected by the complaints of an spc or pc.

As noted above, the supervisor of control room operations works from 8:00 a.m. to 4:30 p.m., Monday through Friday. He and other higher level management officials are available to the spc's and pc's during this time period. They are available on an on-call basis the remainder of the time. The supervisor performs an audit of all of the spc's and pc's work on a daily basis. This consists of his reviewing an audit assembled by a NEPEX operations auditor. The audit consists of graphs, logs, economics, load reserve, pump storage, interchange negotiations, and intertransactions. As part of this audit, the supervisor reviews tape recordings of the telephone calls the spc's and pc's make to the satellites and to other power systems. If he discovers anything he regards as contrary to the NEPEX Operating Procedures or other guidelines, he will seek an explanation for the action from the spc of that shift. If the spc cannot provide a satisfactory explanation, the supervisor will discuss the matter directly with the pc involved.

As noted above, there are 14 NEPEX Operating Procedures that the spc's and pc's must normally follow in carrying out their duties. These procedures deal with every area of their duties and provide the spc's and pc's with specific instructions, guidelines, and controls concerning their operation of the system. Procedure 1 sets out the duties and responsibilities of the spc's and pc's in their communications to the satellites. Procedure 2, discussed above, deals with the operation and repair of equipment used by the spc's and pc's, such as computers,

each of the various entities represented on the executive committee. The operations subcommittee determines the operating procedures under which the system functions, such as the level and type of electrical power reserve that must be available at all times. Both the executive committee and the operations subcommittee have participated in the interviewing and decision-making process with respect to individuals who were hired by Service for executive level positions in the NEPOOL operation. NEPOOL itself has no day-to-day supervisory presence at the Holyoke facility.

Philip Oatness is the executive director of NEPOOL. He reports directly to its executive committee. As with all of the individuals working at the Holyoke facility, he is an employee of Service. None of these individuals is an employee of NEPOOL. There are three NEPOOL directors, one for each of the three divisions -- NEPOOL Billing, NEPLAN, and NEPEX. Russ McEacharn is the director of NEPEX. HE and the other two directors report to Oatness. James Ginnetti is the manager of the NEPEX Operations. He reports to McEacharn. There are three NEPEX supervisors who are in charge, respectively, of forecasting, transmission applications, and control room operations. Steven Rourke is the supervisor of control room operations. He and the other two supervisors report to Ginnetti. Rourke is presently on a temporary assignment to a NEPOOL planning committee. Jack McGuinness, the control room operations assistant, is the acting supervisor. The assistant's position is presently unfilled. The petitioned-for employees report directly to Rourke and McGuinness. The parties agree, and I find that, based on the control they exercise over spc's and pc's in the director of their work and evaluation of their

performance, the supervisor of control room operations and the control room operations assistant are supervisors as defined in the Act, as are the executive director of NEPOOL, the three NEPOOL directors, and the manager of NEPEX Operations -- al of whom are above them in the NEPOOL chain of command.

NEPEX's Holyoke facility is the master control center for the NEPOOL operation. The spc's and pc's operate the control system, which relays instructions from NEPEX, through four satellite operations, to the various generation and transmission sites. This intermediate layer of control (the satellite operations) is necessary because the system is too large to be directly controlled. Accordingly, all members of NEPOOL must also be members of a satellite. Each satellite is operated by an association of its member companies. The satellites are located in Southington, Connecticut; Augusta, Maine; Manchester, New Hampshire; and Westborough, Massachusetts.

The Southington satellite is operated by Convex, the Connecticut Valley Electrical Exchange. It dispatches power to Connecticut and Western Massachusetts. It also provides a backup control function for NEPEX. In case of emergency, the NEPEX control system can operate through and out of the Convex facility. The Augusta satellite dispatches for Maine, the Manchester satellite dispatches for New Hampshire, and the Westborough satellite, REMVEC, dispatches for Rhode Island, Eastern Massachusetts, and Vermont.

The satellite control rooms are staffed by individuals whose job duties are similar to those of the

spc's and pc's. When they receive a directive (i.e., an instruction) from an spc or pc, they may carry out the directive in different ways. They have the capability to carry out some of the directives themselves, from their own control room. The vast majority of the directives, however, are transmitted by them to the generation or transmission site, either directly, or indirectly through another similar control center operated by the individual utility.

Each of the satellites is set up in a manner similar to that of NEPOOL. They each have an operating committee made up of representatives of their members that oversee their operations in a similar fashion to the NEPOOL operating subcommittee.

The Convex satellite is staffed by employees of Service. Service provides the employees pursuant to a contract with the various member companies, except that it has no written agreement with those Convex members that are subsidiaries of Northeast Utilities. The Augusta and REMVEC satellites are staffed by individuals who are not employees of Service. The Manchester facility is staffed by employees of Public Service of New Hampshire, a Northeast Utility subsidiary.

The spc's and pc's must have substantial experience and training in order to be selected for their positions, which were analogized in the record to that of an air traffic controller. Their salary range is higher than that of individuals performing similar tasks for the satellite operations. This differential is based on the

spc's and pc's higher level of responsibility. They do not receive any special benefits.[3]

As noted above, the spc's and pc's work in a control room located in the Holyoke facility. This room operates on a 24 hour a day, 365 days a year schedule. The supervisor and assistant supervisor of control room operations work from 8:30 a.m. to 4:00 p.m., Monday through Friday. They and/or other management level employees are available on an on-call basis at all times. The spc's and pc's work in teams of three, consisting of one spc and two pc's, one of whom serves as loading coordinator (herein loading pc), while the other serves as transmission and security coordinator (herein security pc). They work 12 hour shifts from 7:00 a.m. to 7:00 p.m. This is done on a rotating schedule.

The spc is in charge of the shift. It is his primary responsibility to overview all of the developments which the pc's handle on a minute-to-minute basis so as to monitor the "big picture" of how conditions are likely to develop over the entire shift. This position was added because the proliferation of assignments made it difficult for the two pc's to do anything but concentrate on their immediate duties. The spc has the authority to resolve disagreements between the loading pc and the security pc regarding the operation of the system. If a pc does not follow the

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[3] At one time Service provided its supervisory level employees with a $50,000 disability insurance policy. This was also provided to the spc's and pc's. It is unclear when this benefit ceased, but it was clearly not in effect as of the date of the hearing.

instructions of an spc, the spc would report this to the supervisor. Such a refusal has never occurred. The spc's are consulted by the supervisor as part of the evaluation process of the pc's, but there is no record evidence that such evaluations are in any way based on the spc's oral comments. If an spc or pc is going to be absent or late they must contact either the supervisor, the assistant, or someone above them in the chain of command. The spc on duty would then use a list of "spares," employees who are available to work, to secure a replacement. Until a replacement is secured, the affected pc or spc on the current shift must remain at his station.

The job description of the spc position reads as follows:

> 1. Coordinate Pool Coordinators' shift operations to promote consistent application of NERC Operating Guides; NPCC Operating Procedures; NEPEX Operating Procedures;[4] NEPEX Criteria, Rules and Standards; and other established guides and instructions.
>
> 2. Directs the Loading and Security positions in the correction of violations to operating procedures and practices.

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[4] There are 14 NEPEX Operating Procedures that the spc's and pc's must normally follow in carrying out their duties. These procedures, which are discussed in detail below, deal with every area of these duties and provide the spc's and pc's with specific instructions, guidelines, and controls concerning their operation of the system.

3. Concentrates efforts on the scheduling and pricing of interchange transactions, adjustments to generator commitment/decommitment schedules, revisions to water management schedules, etc.

4. Issues approval to Loading and Security positions to take emergency actions.

5. Make final determination of actions to be taken in the event of conflicts between Loading and Security positions.

6. Instructs Pool Coordinators in the application of new or revised operation procedures or instructions.

7. Recommends practices and procedures to improve the effectiveness of NEPEX operations.

8. Communicates with NEPEX supervision concerning abnormal operating situations.

When assigned to the Outage Application position, performs the following duties:

9. Concentrates efforts on analyzing and granting approval to transmission equipment outage requests.

10. Assures that appropriate operating reliability criteria can be maintained during planned transmission outages.

11. Coordinates planned transmission equipment outages with Satellites and neighboring pools.

The pc's alternate on a daily basis between the loading coordinator position and the transmission and security coordinator position. The job description for the pc position reads as follows:

1. Supervises and coordinates the functions of the four Satellite control centers.

2. Supervises the actual dispatch of all NEPOOL generation and transmission facilities.

3. Administers real-time control over the water resources of the Connecticut and Deerfield Rivers including pumped storage plants and revises water management plans as required.

4. Establishes hourly interchange schedules with adjacent AC interconnected electric system.

5. Monitors energy flow between New England and adjacent interconnected electric systems and takes corrective action.

6. Coordinates power imports from Hydro-Quebec and the real-time dispatch of the DC interconnected electric systems.

7. Administers generator start-up and shut-down schedules.

8. Ensures that the operations computer data base, entered at NEPEX and the Satellites, is updated regularly.

9. Conducts studies to determines the level of reliability of the New England bulk power transmission system.

10. Prepares plans to cope with possible or projected contingency conditions.

11. Monitors energy flows and voltages in neighboring pools and acts to protect neighboring pools from detrimental effects of major New England contingencies.

12. Determines the need for and orders the arming of special protection systems.

13. Administers and classifies generator maintenance outages within the Optimized Daily Forecast (ODF) period.

14. Analyzes and grants approval to transmission equipment outage requests.

15. Assures that dispatch conforms to NEPEX Operating Procedures and NEPEX Criteria, Rules, Standards.

16. Disseminates appropriate information on New England bulk power supply system to the Satellite control centers.

17. Maintains an official NEPEX log of system operations.

18. Revises predictions of NEPEX loads and reruns the ODF as necessary.

19. Utilizes sophisticated central computer and microprocessor hardware and software facilities and communication equipment required for the dispatch of the New England bulk power supply system.

20. Grants approval of maintenance outages of NEPEX and Satellite operations computers and communications facilities.

21. Administers capacity and energy contracts between NEPOOL participants and adjacent pools on an hourly basis.

The loading pc is in charge of the generation and transmission functions, as well as the buying and selling of power. His use of hydroelectric power, both from dams and pump storage generating plants, must take into account not only the economy of generation, but also the other uses to which the rivers are

put. He is also responsible for maintaining the "operating reserve" or "first contingency reserve." The reserve requires that sufficient excess generation be maintained on line to be able to replace the loss of the largest single generation plant within ten minutes. His function is to ensure that there is sufficient power available to satisfy the current load plus the necessary reserve, but not more than what is necessary, as it is uneconomical to generate an excess reserve.

The loading pc operates with the aid of a computer and telemetered information. This enables him to monitor not only the current "load," or required level of power, but also the trend of the load, and to determine on a minute-to-minute basis how much, as well as what mix of, generation is necessary and what buying and/or selling of power needs to be administered in order to meet that load. The loading pc accomplishes this by giving directives to the generation and transmission operators through the satellites and by entering into agreements with other power systems to buy and/or sell power.

The cost of power is the loading pc's primary concern in his selection of what type of power to generate or whether to purchase power from another system. The various types of power at his disposal are assigned a cost factor. He does not determine this factor. His job is simply to operate the system with the lowest cost power available. This means that he may purchase power from another system if it is available at a lower cost than NEPOOL can generate power at. Likewise, he may sell excess power he has available to another system if it is profitable to do so. In making these decisions he must also consider that the power, whether

generated or purchased, must be capable of being transmitted to where in the system it is needed and that the operating reserve must be maintained.

Contracts for the purchase and sale of power are between the two participating utilities, but are administered by NEPEX pursuant to the NEPOOL agreement. There are two types of contracts. One is a "must take" contract under which NEPOOL has committed to purchase a certain amount of power at a prearranged price. The other type of contract is a "dispatchable" contract where the power is available and the loading pc must decide whether to take it or not. The dispatchable contracts run on an hourly basis and are made between the loading pc and his counterpart in the other system. Once the contract is undertaken NEPOOL is obligated to buy the power. This type of contract is also referred to as "economy power." This phrase is used to describe a transaction in which the loading pc either agrees to purchase excess power from another system at a rate lower than NEPOOL can produce it, or where the loading pc sells excess power NEPOOL has available for more than the cost to NEPOOL of generation.

The loading pc determines how much power to purchase or sell based on a price differential. He determines the cost of the power with the aid of a computer program. The program provides him with a sale or purchase price for a certain block of power. If he is of the opinion that the price arrived at by the computer is not accurate, he can do his own calculations based on certain set prices for various types of power the system can generate. If the loading pc varies from the price set by the computer, he must make an entry in his log to

reflect this. These purchases and sales can involve savings to NEPOOL of hundreds of thousands of dollars in a single transaction and millions of dollars on an annual basis.

The security pc performs an ongoing contingency analysis of the entire system, including the monitoring of the high voltage transmission system. He also determines outage applications and monitors the possible loss of the Hydro-Quebec power connection.

On a regular basis, the security pc will direct the generation of uneconomic power in order to maintain the integrity of the system. In an emergency situation he can take what is referred to as "drastic action" up to and including loadshedding. Loadshedding is the curtailment of all power in certain areas. This causes a series of small, short-term blackouts and is done to avoid a larger, more lengthy loss of power. The security pc also monitors the system to make sure "cascading" does not take effect. Cascading occurs when one line or transmission element not only goes out of service, but also overloads other lines or transmission elements and causes them to fail.

The security pc also has the authority to approve outage requests. An outage occurs when a utility requests permission to shut down a generation source in order to perform maintenance work on it. The security pc can disapprove the request if he believes it threatens the integrity of the system. He can also cancel permission if conditions change subsequent to an approval of the request. This can, and has, caused the cancellation of scheduled maintenance by member utilities.

As noted above, the spc's and pc's carry out certain of their tasks by giving instructions to their counterparts at the four satellites. If the satellite employee is resistant to, or slow in complying with, the instruction, the spc or pc will note this in his log and will report it to the control room operations supervisor. The supervisor, either directly or through higher level management officials, will contact the satellite employee's supervisor to discuss the matter. Neither the spc's, nor the pc's, nor any member of NEPOOL management has any authority or control over the satellite employees. There is no record evidence of any satellite employee's status having been affected by a report or inquiry from NEPEX. A direct refusal to follow instructions has never occurred.

The spc's and pc's can contact the NEPEX engineering department directly if they need equipment repaired or serviced. An on-call engineering department employee is always available for such work. The schedule by which the equipment will be repaired or serviced, i.e., immediately, next working day, or within 24 hours, is determined by NEPEX Operating Procedure 2, which categorizes the various types of equipment according to the immediacy of the need to repair them. If the spc or pc believes that the response by the engineering department is not satisfactory, he reports this to the control room supervisor, who will then discuss the situation with the engineering department supervisor and/or higher level of management. Neither the spc's nor the pc's have any direct control over engineering department employees. There is no record evidence of any engineering department employee's

status having been affected by the complaints of an spc or pc.

As noted above, the supervisor of control room operations works from 8:00 a.m. to 4:30 p.m., Monday through Friday. He and other higher level management officials are available to the spc's and pc's during this time period. They are available on an on-call basis the remainder of the time. The supervisor performs an audit of all of the spc's and pc's work on a daily basis. This consists of his reviewing an audit assembled by a NEPEX operations auditor. The audit consists of graphs, logs, economics, load reserve, pump storage, interchange negotiations, and intertransactions. As part of this audit, the supervisor reviews tape recordings of the telephone calls the spc's and pc's make to the satellites and to other power systems. If he discovers anything he regards as contrary to the NEPEX Operating Procedures or other guidelines, he will seek an explanation for the action from the spc of that shift. If the spc cannot provide a satisfactory explanation, the supervisor will discuss the matter directly with the pc involved.

As noted above, there are 14 NEPEX Operating Procedures that the spc's and pc's must normally follow in carrying out their duties. These procedures deal with every area of their duties and provide the spc's and pc's with specific instructions, guidelines, and controls concerning their operation of the system. Procedure 1 sets out the duties and responsibilities of the spc's and pc's in their communications to the satellites. Procedure 2, discussed above, deals with the operation and repair of equipment used by the spc's and pc's, such as computers,

telecommunications equipment, telephones, and data links. Procedure 3 involves the operation of the transmission system. It sets out when and how member utilities will submit applications for transmission outages and the standards to be applied by the spc or pc in determining whether to approve or disapprove the request. Procedure 4, (discussed infra) deals with capacity deficiency. It sets forth specific guidelines and actions that the spc's and pc's must normally follow. Procedure 5 applies to generation maintenance outages. It sets forth the procedures under which such outages are approved and the procedures under which the spc's and pc's can cancel scheduled outages. Procedure 6 is a restoration procedure. It provides the spc's and pc's with the procedure to be used to restore the system from a total blackout. Procedure 7 deals with loadshedding. It sets out the calculations that are necessary in order to determine the amount of load that needs to be shed. It also provides the spc's and pc's with a list of actions to take. Procedure 8 involves the operating reserve. It sets forth the procedure under which the spc's and pc's direct the satellites in maintaining the proper operating reserve. Procedure 9 involves internal combustion units. It details how they are to be operated and tested. It also provides the procedure to be used by the spc's and pc's in ordering them on or off line. Procedure 10 is a U.S. Department of Energy alert procedure. It sets out guidelines on how the spc's and pc's contact the Department of Energy when there is a major outage of power and how higher level management must subsequently make a written report concerning the incident to the Department. Procedure 11 sets forth the actions the spc's and pc's take to redispatch the system if an area declares an air pollution alert. Procedure 12 deals with voltage control. It provides the spc's and pc's

with guidelines on how to contain abnormal voltage in the system. Procedure 13 involves an energy deficiency situation. It details how load is to be shed and how the energy deficiency must be reported to the State Department of Public Utilities. Procedure 14 deals with drastic actions during light load situations. It provides guidelines to the spc's and pc's on what actions they should take to prevent light load situations, as well as the procedures to "dump" or sell off excess power in these situations.

Operating Procedure 4 (attached hereto as Appendix A) is illustrative of the NEPEX Operating Procedures. It deals with action during a capacity deficiency. It is six pages long and sets forth 14 specific actions the spc's and pc's must normally take in this situation and the order in which they must normally implement them. It also contains a two-page appendix which provides estimates of how much additional generation of power or reduction in load would be accomplished by following each of the various actions. It further contains two additional three-page appendices which set forth specific unique procedures to be followed in regard to two generation plants that have limits set on the temperature level of their discharge water by the U.S. Environmental Protection Agency. Procedure 4 also references eight other documents which provide the spc's and pc's with guidelines in this situation, including four other NEPEX Operating Procedures. These other documents, which are also referenced in the spc's and pc's job descriptions, include the North American Electric Reliability Committee Operating Guides, NPCC Operating Procedures, NEPEX Criteria, Rules, and Standards, and other established guides and instructions.

Service's management memorandum directed to spc's and pc's regarding their implementation of Procedure 4 (attached hereto as Appendix B) clearly indicates that the spc's and pc's are normally required to follow the guidelines set forth in the NEPEX Operating Procedures and other referenced documents. They may, however, vary from them, if necessary. If time allows, they are required to contact supervision before initiating the action. If there is not sufficient time to make contact prior to their taking action, they must contact supervision immediately upon completing the action and inform them of it.

THE JOINT EMPLOYER ISSUE

In order to find the existence of a joint employer relationship, it must be shown that the two separate business entities share or codetermine those matters governing the essential terms and conditions of employment of the employees in question, and that one employer meaningfully affects matters relating to the employment relationship -- such as hiring, firing, discipline, supervision, and direction -- over the employees employed by the other employer. See Boiire v. Greyhound Corp., 376 U.S. 473, 55 LRRM 2694 (1964); NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 111 LRRM 2748 (3d Cir. 1982); International Transfer of Florida, Inc., 305 NLRB No. 20, slip op. at 3 (Sept. 30, 1992), and cases cited therein.

In the instant case, as noted by the Petitioner, NEPOOL determines the operational procedures under which the Service employees assigned to it work, approves the budget pursuant to which they

are paid, and has exercised influence over executive level hiring. These factors alone, however, are not sufficient to establish joint employer status under the above-cited cases. In this regard, it is noted that the contract between NEPOOL and Service indicates that Service is to be the employer of the employees in question. While not controlling, the language of the agreement is indicative of the parties' intentions. An examination of the record evidence confirms that they have operated the Holyoke facility in accordance with those intentions. All elements of the employees' terms and conditions of employment, including hiring, compensation, personnel procedures, supervision, and discipline, are solely under the control of Service. NEPOOL, which has no supervisory staff, nor any type of administrative operation, has no effect whatsoever on these matters.

Accordingly, I find that NEPOOL is not a joint employer of the employees in question, and I shall, therefore, dismiss the petition as it applies to NEPOOL. Club A, 285 NLRB 521, 522 (1987); H & W Motor Express, 271 NLRB 466, 468 (1984). See also Wes Ltd. Co., 309 NLRB No. 33 (Oct. 13, 1992).

As the scope of the unit sought by the Petitioner is not predicated upon NEPOOL being a joint employer of the petitioned-for employees, my finding that Service is their sole employer does not render the unit inappropriate. Compare H & W Motor Express, supra, and Laerco Transportation, 269 NLRB 324, 326 (1989). Cf. Kasper Disposal Service, 286 NLRB 14 (1987).

THE SUPERVISORY ISSUE

It is well settled that an employee cannot be transformed into a supervisor by the vesting of a title and the theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. Magnolia Manor Nursing Home, Inc., 260 NLRB 377, 385, n. 29 (1982). To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Somerset Welding & Steel Inc., 291 NLRB 913 (1988); Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985). Consistent with the statutory language and the legislative intent, however, it is will recognized that the disjunctive listing of supervisory indicia in Section 2(11) does not alter the requirement that a supervisor must exercise independent judgment in performing the enumerated functions. Thus, the exercise of supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, the test of which must be the significance of the judgment and directions. Ohmite Co., 290 NLRB 1036 (1988); Opelika Foundry, 281 NLRB 897, 899 (1986); Hydro Conduit Corp., 254 NLRB 433 (1981). Additionally, the decisive question is whether the employee has been found to possess the authority to use independent judgment with respect to the exercise of one or more of the specific authorities listed in the Act. Advanced Mining Group, 260 NLRB 486, 506-507 (1982). Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective. Finally, the burden of proving that an individual is a supervisor rests on the party alleging that such status

exists. Tuscon Gas & Electric Co., 241 NLRB 181 (1979). Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. Phelps Community Medical Center, 295 NLRB 486, 490 (1989).

On balance, I find that Service has fallen short of its burden of establishing that the disputed employees are supervisors within the meaning of the Act.

Service contends that the spc's and pc's are supervisors within the meaning of the Act in that they exercise independent judgment in the responsible direction of other employees in the course of carrying out their responsibilities for the generation and transmission of power throughout the NEPOOL system. Service argues that the spc's and pc's exercise independent judgment in that they are responsible for decisions involving increasing, decreasing, buying, and selling power. It acknowledges that they must normally conform to NEPEX Operating Procedures and other guidelines, but contends that as the spc's and pc's have the discretion to operate the system in a non-prescribed manner, without prior supervisory approval, the Operating Procedures and related guidelines do not eliminate their exercise of independent judgment. It further contends that this independent judgment is exercised in the responsible direction of the satellite employees, including the Service employees employed at the Convex satellite, who are required by the NEPOOL agreement to follow the directives of the spc's and pc's.

Service also contends that the spc's and pc's exercise independent judgment in the responsible direction of the NEPEX engineering department by establishing the order of repair of the equipment used in the control room.

Finally, Service argues that, at a minimum, the spc's are supervisors based upon their exercise of supervisory control of the pc's. It notes that the spc's resolve disputes between the pc's regarding the operation of the system, provide input into the pc's evaluations, and direct off-duty pc's to come to work to substitute for absent employees.

In further support of these arguments, Service notes that if the spc's and pc's are not supervisors, then there is no supervision of the control room during the periods when the control room operations supervisor and assistant supervisor are not present, i.e., from 9:30 p.m. to 8:00 a.m. daily, and all day on weekends and holidays. Moreover, it notes that the pc's are paid more than their satellite counterparts and that spc's are paid a grade higher than the pc's.

Service relies primarily upon the Board's decision in Big Rivers Electric Corporation, 266 NLRB 380 (1983), as authority for its position. Big Rivers was a unit clarification proceeding in which the Board granted the employer's request to clarify the existing systemwide unit of operations and maintenance employees by excluding the newly created position of system supervisor on the ground that it was a supervisory position within the meaning of the Act.

While it is true, as noted by Service, that there are many similarities between the system supervisors in Big Rivers and the spc's and pc's in the instant case, there are also significant distinguishing factors. First, unlike the system supervisors found to be statutory supervisors in Big Rivers, the spc's and pc's here operate under comprehensive procedures from which they cannot vary without supervisory approval except in circumstances when there is not sufficient time to contact supervisors. Even in those circumstances, they must immediately report their actions to their supervisors. Although supervision is not present at all times, it is available on an on-call basis, and the actions of the spc's and pc's are closely reviewed by supervision by means of the daily audit. In contrast, the system supervisors in Big Rivers, whom the Board found exercised independent judgment, had no such specific guidelines, nor did they have to obtain approval for their actions prior to implementing them. Second, the spc's and pc's have almost no direct contact with the employees who actually perform the work that their instructions require be done. Rather, they communicate with the generation and transmission operations through the satellites and utility company control room personnel. This is unlike the situation in Big Rivers where, in certain circumstances, the system supervisors directly communicated with the field employees who were performing the work in question and gave them specific instructions regarding the performance of their job duties. See McCullough Environmental Services, 306 NLRB No. 107, slip op. at 2 (Feb. 28, 1992), where the Board, finding certain employees not to be statutory supervisors, distinguished Big Rivers, noting that the "system supervisors . . . personally directed employees in complex switching operations . . . ." Finally, all the

employees involved in Big Rivers worked for the same employer, whereas here, many of the employees to whom the spc's and pc's issue instructions are employed by other employers.

In further support of its position that the spc's and pc's are statutory supervisors, Service also cites Dale Service Corp., 269 NLRB 924 (1984), and the court decisions in Arizona Public Services Co. v. NLRB, 453 F.2d 228, 79 LRRM 2099 (9th Cir. 1971), NLRB v. Detroit Edison Co., 537 F.2d 239, 92 LRRM 3021 (6th Cir. 1976), Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347, 104 LRRM 2902 (1st Cir. 1980), Southern Indiana Gas and Elec. Co. v. NLRB, 657 F.2d 878, 108 LRRM 2056 (7th Cir. 1981), and Monongahela Power Company v. NLRB, 657 F.2d 608, 108 LRRM 2352 (4th Cir. 1981). The court cases cited by Services are, however, distinguishable from the instant case on the same basis as is Big Rivers. Thus, those cases all involved individuals who exercised direct control over employees engaged in performing the actual job assignments and whose actions were not restricted by specific guidelines and procedures.[5] Dale Services Corp., supra, which was also distinguished by the Board in McCullough Environmental Services, supra, is equally inapplicable to the instant matter. In Dale Services, the individuals found to be statutory supervisors, unlike the spc's and pc's here, directly assigned work to other employees.

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[5] To the extent that it is precedential, I also find that the Regional Director's Decision in Pennsylvania Power and Lighting Company, Case 4-UC-175 et al. to be distinguishable on the same basis.

The fact that for periods of time the spc's and pc's are the highest authority in the control room is not sufficient to establish supervisory authority in light of the predetermined nature of their duties and the on-call status of supervisory level employees. McCullough Environmental Services, supra, slip op. at 2. With respect to the fact that spc's and pc's receive a higher rate of pay than other employees, I find that this is simply reflective of their higher level of skill and greater experience.

Accordingly, I find that the spc's and pc's do not exercise independent judgment in the responsible direction of the employees to and through whom they issue directives in the performance of their work. See Clark Machine Corp., 308 NLRB No. 80 (Aug. 31, 1992); Quadrex Environmental Co., 308 NLRB No. 20 (July 31, 1992); McCullough Environmental Services, supra. See also Southwest Airlines Co., 239 NLRB 1253, 1254 (1978).

Even assuming arguendo, however, that the spc's and pc's exercise independent judgment in the responsible direction of these other employees, this would still not warrant a finding of supervisory status. It is well established that in order to support a finding of supervisory status the employee in question must exercise supervisory authority over employees of the employer in issue, and not employees of another employer. Crenulated Co., 308 NLRB No. 178 (Sept. 30, 1992), and cases cited therein. In the instant case, the employees of three of the four satellites, Augusta, Manchester, and REMVEC, are not employed by Service, thereby removing their relationship with the

spc's and pc's from consideration in terms of the supervisory status of the spc's and pc's.

The employees of the Convex satellite are employees of Service. They are not unit employees, however. The Board has held that it will apply the following test in determining the supervisory status of an individual who exercises supervisory authority over non-unit employees:

> [T]o ascertain whether an individual's exercise of supervisory authority over employees outside the unit warrants his exclusion as a supervisor, we must make a complete examination of all the factors present to determine the nature of the individual's alliance with management. Relevant factors to be considered will include, but not be limited to, the business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included. We will continue to view time spent in performance of supervisory duties relevant, but not controlling, to our analysis. Further, our consideration of this factor will no longer rely on a rule that

> draws the line for finding supervisory status at individuals whose supervisory duties require 50 percent or more of their time. [Citations omitted.]

Detroit College of Business, 296 NLRB, 318, 321 (1989).

In the instant case, the record does not indicate the percentage of their work time spent by the spc's and pc's in giving directions to the Convex employees. Convex is, however, only one of four satellites with which the spc's and pc's interface. There is also nothing in the record to suggest that Convex employees require an inordinate amount of direction. From this it would appear that 25 percent or less of the spc's and pc's total work time would be spent in the direction of Service employees assigned to Convex. The burden of uncertainty in this area falls upon Service since, as the party contending that supervisory status exists, it has the burden of establishing each relevant factor, such as time spent supervising non-unit employees. Phelps Community Medical Center, supra; Tuscon Gas & Electric Co., supra.

As regard the other factors looked at by the Board in considering supervision of non-unit employees, I note that Service provides labor and other related services to NEPOOL. It provides similar services to Convex under a separate contract. All of the unit employees are involved in giving directions to the non-unit Service employees assigned to Convex regarding the operation of the NEPOOL system. The spc's and pc's have no direct control over the non-unit employees. Rather, they may report what they consider to be poor performance by these employees to their own

supervisors at NEPEX, who, in turn, may contact Service supervisory level employees located at Convex. There is, however, no evidence that any such complaints have been acted upon. Moreover, the mere relaying of complaints concerning other employees to management does not establish supervisory authority. See Pepsi-Cola Bottling Co., 154 NLRB 490, 493-494 (1965). There is no conflict within the bargaining unit, as all of its members engage in giving direction to the non-unit employees. The actions of the spc's and pc's in directing the non-unit employees do constitute a part of their primary work product. Nevertheless, these actions are not performed by the spc's and pc's in the interest of furthering the policies of Service, but rather, are taken in the interest of furthering the policies of NEPOOL.

In light of all the foregoing factors, I find that even assuming arguendo that the spc's and pc's use independent judgment in the responsible direction of the non-unit employees assigned to Convex, this would not so ally them with management as to warrant a finding that they are supervisors as defined in the Act. See generally, Detroit College of Business, supra.

I also find, contrary to Service's contention, that the spc's and pc's do not exercise independent judgment in the responsible direction of the non-unit NEPEX engineering department employees. In this regard, I note that which engineering department employee responds to the spc's or pc's request for service is determined by that department, and the speed of his response is predetermined by Operating Procedure 2. See Clark Machine Corp., supra; Quadrex Environmental Co., supra; McCullough Environmental Services, supra. Even if I were to find that independent

judgment was exercised by the spc's and pc's in responsibly directing the engineering department employees, an application of the Detroit College of Business test to the spc's and pc's does not lead to the conclusion that they are so allied with management because of this occasional exercise of direction as to warrant a finding that they are supervisors as defined in the Act. See generally, Detroit College of Business, supra.

I also find Service's argument that the spc's exercise supervisory authority over the pc's to be without merit. The pc's schedule is set by higher level management and their work assignments are predetermined. The spc's calling in "spare" pc's to work and not allowing pc's then working to leave until the spare arrives is a matter of routine. The spc's resolution of disputes between the pc's is a matter of the spc's superior knowledge and experience. There is no record evidence that an spc's comments to supervision regarding a pc's performance has ever affected the pc's employment status. As noted above with respect to both the spc's and pc's, the fact that they are for periods of time the highest authority in the control room is not sufficient to establish supervisory status. Their higher rate of pay compared with that of the pc's is reflective of the spc's greater skill and experience.

In light of all of the above, I find that the spc's do not exercise independent judgment in the responsible direction of the pc's, and that they do not effectively recommend personnel actions regarding them. See Clark Machine Corp., supra; Quadrex Environmental Co., supra; McCullough Environmental Services, supra.

THE MANAGERIAL ISSUE

It is well established that employees will be excluded as managers only if they formulate and effectuate management policies or have discretion in their jobs independent of the employer's established policy. See Reading Eagle Co., 306 NLRB No. 174 (Mar. 27, 1992); Long Beach Press Telegram, 305 NLRB No. 46 (Oct. 11, 1991); and Ohio River Company, 303 NLRB No. 104, ALJD slip op. at 35 (July 16, 1991), and cases cited therein.

Service contends that the spc's and pc's are managerial employees in that they exercise discretion in making decisions that financially impact its operations. In support of its argument, Service notes that the spc's and pc's direct the increase or decrease of power in the system, approve or disapprove maintenance-related outage requests, control hydroelectric operations, enter into contracts involving both the purchase and sale of power, and call in employees to work and/or hold them at work past their shift ending times. As authority for its position, it relies primarily upon Central Maine Power Co., 151 NLRB 42 (1965). It also cites Salinas Newspapers, 279 NLRB 1007 (1986); ITT Grinnell, 253 NLRB 584 (1980); and Simplex Industries, 243 NLRB 111 (1979), in support of its position.

As noted above, there is no discretion on the part of the spc's in terms of selecting pc's to come in off shift, or to stay beyond shift. The employees who are working must stay until they are relieved, and the off-shift replacement employees are selected from a predetermined "spare" list. As noted above, the

Operating Procedures and related guidelines limit the discretion of the spc's and pc's in the areas of increasing or decreasing power, approving or disapproving outage requests, controlling hydroelectric operations, and entering into contracts for the purchase and sale of power. In this regard, I particularly note that while the spc's and pc's make contracts for the purchase or sale of power, they do so on a simple cost basis. They determine the cost effectiveness of their contemplated actions either by the use of a computer or by manual calculations using a predetermined set of generation costs for the various types of power available. The extent to which they can take action based upon the calculated cost savings is limited by the Operating Procedures and related guidelines, in particular the need to maintain a proper power reserve.

Accordingly, I find that the spc's and pc's are not managerial employees. I find Central Maine Power Co., supra, relied upon by Service, to be distinguishable from the instant matter. In Central Maine, the load dispatchers found to be managerial employees, unlike the spc's and pc's here, had no limitations placed upon their actions. Moreover, as indicative of their status, they were listed on their employer's organizational chart on the same level as second level supervisors. I further find Salinas Newspapers, supra, ITT Grinnell, supra, and Simplex Industries, supra, not to be controlling. In those cases, the employees found to be managerial could either independently approve the granting of their employer's credit and/or adjust the amount customers owed on their bill. The spc's and pc's have no connection whatsoever with billing, which is done by the NEPOOL billing staff. Their discretion in buying and selling power must be

evaluated in light of the relationships between NEPOOL and the other power systems. This is not a situation, as in the cases cited by Service, where the employee "selling" the product must exercise his discretion in determining the credit-worthiness of the buyer. Rather, this is a situation involving an ongoing relationship between large associations of power producers. When an spc or pc determines to sell power to the New York Power Plant Pool, for example, he does not have to decide the likelihood of whether that system can pay its bill. Moreover, I note that these contracts do not involve Service, but rather, are between the utilities actually involved in the purchase or sale, and are simply administered by the spc's and pc's pursuant to the NEPOOL agreement. As such, they have no direct financial impact upon Service.

In light of all the above, I find that the spc's and pc's are not managerial employees. See Reading Eagle Co., supra; Long Beach Press Telegram, supra; The Ohio River Company, supra. See also Southwest Airlines Co., supra.

Accordingly, I find that the following employees of the Employer, Service, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time senior pool coordinators and pool coordinators employed by Northeast Utilities Service Corporation at the NEPOOL facility in Holyoke, Massachusetts, but excluding all office clerical employees, professional

employees, guards and supervisors as defined in the Act and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or have been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Brotherhood of Electrical Workers, AFL-CIO, CLC.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 12136 (1966); N.L.R.B. v. Wyman-Gordan Company, 394 U.S. 759 (1960). Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts 02222-1072, on or before April 15, 1993. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.K., Washington, D.C. 20570. This request must be received by the Board in Washington by April 22, 1993.

Rosemary Pye,
Regional Director
First Region
Thomas P. O'Neill, Jr.
Federal Building
10 Causeway Street
Sixth Floor
Boston, Massachusetts
02222-1072

Dated at Boston, Massachusetts
this 8th day of April, 1993.

(2)

No. 94-1033

FILED
FEB 21 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

NORTHEAST UTILITIES SERVICES CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals reasonably concluded that petitioner's senior pool coordinators and pool coordinators are neither "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act nor "managerial employees."

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1093

NORTHEAST UTILITIES SERVICES CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 35 F.3d 621. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. B1-B7) is unreported, but is noted at 313 N.L.R.B. No. 65 (Table). The Regional Director's decision and direction of election in the underlying representation proceeding (Pet. App. D1-D39), and the Board's order denying petitioner's request for review of that decision (Pet. App. C1-C2), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1994. The petition for a writ of certiorari was filed on December 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner provides manpower and administrative support to utilities and collectives that buy and sell electric power. Pet. App. B2, D4. One of its customers is the New England Power Pool (NEPOOL), an association of approximately 100 electric utility companies. The NEPOOL companies operate about 300 generating plants in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island. *Id.* at A3, D3. Under its service contract with NEPOOL, petitioner staffs NEPOOL's three operating divisions. The operating division involved here is NEPEX, which regulates the day-to-day production, sale, and purchase of power by the 300 generating plants in the NEPOOL system. *Id.* at A3-A4, D4.

The NEPEX control room in Holyoke, Massachusetts, is the master control center of the NEPOOL system. Pet. App. A4, D7. The control room is staffed by a supervisor, an assistant supervisor, six "senior pool coordinators" (SPCs), and twelve "pool coordinators" (PCs). *Id.* at D5.[1] The control room operates 24 hours per day, 365 days per year. The supervisor and assistant supervisor work from 8:30 a.m. to 4:00 p.m. Monday

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[1] The control room supervisor reports to NEPEX's operations manager, who in turn reports to NEPEX's director. Pet. App. D6. The assistant control room supervisor, control room supervisor, operations manager, and director are "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11). Pet. App. D6-D7.

through Friday and are on call at all other times. Teams consisting of one SPC and two PCs work twelve-hour shifts (beginning at 7:00 a.m. and 7:00 p.m.) every day of the week. *Id.* at A4, D9.

The SPCs and PCs are responsible for buying and selling power among the member utilities as economically as possible while avoiding power outages. They may also order repair services for control room equipment from the NEPEX engineering department. Pet. App. A4, D18. One of the two PCs on a shift serves as the "generation/load" PC, while the other PC serves as the "transmission/security" PC. *Id.* at A5, D9. The "generation/load" PC's duties include buying and selling power among member and nonmember plants and reserving sufficient unused capacity to ensure continued operation of the system in the event of a shutdown at the largest single plant, *id.* at A5, D14-D17; the "transmission/security" PC's duties include arranging for continued power in the event of a plant shutdown, directing the generation of power uneconomically to maintain the integrity of the system, monitoring the system to prevent "cascading," and ordering "loadshedding" in emergency situations.[2] *Id.* at A5, D17. The SPC's duties are similar to those of the PCs, but instead of focusing on the system's minute-to-minute requirements, the SPC focuses on the system's needs over the course of the entire shift. *Id.* at A5, D9. In discharging their duties, the SPCs and PCs follow

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[2] "Cascading" occurs when one line or transmission element goes out of service and thereby overloads other lines or transmission elements, causing them to fail. Pet. App. D17. "Loadshedding" is the short-term curtailment of all power in certain limited areas to avoid a larger, more lengthy loss of power. *Ibid.*

fourteen NEPEX operating procedures. The operating procedures address every aspect of their responsibilities and provide specific instructions and guidelines for the operation of the system. *Id.* at A4, D19.

Because of the size of the NEPOOL system, the SPCs and PCs do not communicate directly with the generating plants in the network. Rather, each plant in the system is a member of one of four regionally organized satellite operations, which functions as an intermediate layer of control between the NEPEX control room and the plant sites. Pet. App. A4, D7. Each satellite operation is staffed by people whose job duties are similar to those of the SPCs and PCs. *Id.* at D7-D8. The SPCs and PCs give instructions to their counterparts at the satellite operations, who relay those instructions to the affected plants. *Id.* at A4, D8, D18. The staff at CONVEX, the satellite operation covering plants in Connecticut and western Massachusetts, are, like the SPCs and PCs at NEPEX, employed by petitioner; the staffs at the other three satellite operations, however, are not employees of petitioner. *Id.* at A4, D7, D8.

2. On November 12, 1992, Local 455 of the International Brotherhood of Electrical Workers, AFL-CIO (the Union), filed a representation petition with the National Labor Relations Board (Board) seeking certification as the collective-bargaining representative of the SPCs and PCs employed by petitioner in the NEPEX control room. Gov't C.A. Br. 5; Pet. App. D5.[3]

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[3] Initially, the Union asserted that the SPCs and PCs were jointly employed by petitioner and NEPOOL. Pet. App. D5. The Board's Regional Director, however, found that petitioner was the sole employer of the SPCs and PCs, and accordingly dismissed the representation petition as to NEPOOL. *Id.* at D23. The Union did not challenge that finding in the court of appeals, and it is not at issue here.

Petitioner sought dismissal of the Union's petition on the ground that the SPCs and PCs are either "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11), or, alternatively, are "managerial employees." Pet. App. D5.[4] After a hearing, the Board's Regional Director

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[4] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and thus from the coverage of the Act, "any individual employed as a supervisor." Section 2(11) of the Act, 29 U.S.C. 152(11), defines supervisor to mean:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with "'genuine management prerogatives,'" and employees—such as "'straw bosses, leadmen, and set-up men'"—who enjoy the Act's protections even though they perform "'minor supervisory duties.'" *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., at 4 (1947)). Although "managerial employees," like supervisors, fall outside the Act, they do so by virtue of judicial interpretation, rather than an explicit statutory exclusion. See *Bell Aerospace*, 416 U.S. at 283-289. An employee is considered managerial "only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *NLRB* v. *Yeshiva University*, 444 U.S. 672, 683 (1980). Such employees are "'much higher in the managerial structure' than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.'" *Id.* at 682 (quoting *Bell Aerospace Co.*, 416 U.S. at 283).

rejected petitioner's contentions and ordered an election among the SPCs and PCs. *Id.* at D1-D39.

a. Although the Regional Director acknowledged that "the [SPCs] and [PCs] must have substantial experience and training in order to be selected for their positions," Pet. App. D8, she concluded that "[o]n balance * * * [petitioner] has fallen short of its burden of establishing that the disputed employees are supervisors within the meaning of the Act." *Id.* at D25.

First, the Regional Director found that the SPCs and PCs do not exercise "independent judgment" within the meaning of Section 2(11). Pet. App. D29. Rather, the Regional Director found that the SPCs and PCs "operate under comprehensive procedures from which they cannot vary without supervisory approval except in circumstances when there is not sufficient time to contact supervisors"; that, even in such circumstances, the SPCs and PCs "must immediately report their actions to their supervisors"; and that, while supervision is not present at all times, "it is available on an on-call basis, and the actions of the [SPCs] and [PCs] are closely reviewed by supervision by means of [a] daily audit." *Id.* at D27. Although "for periods of time the [SPCs and PCs] are the highest authority in the control room," the Regional Director noted that this fact did not establish that the SPCs and PCs are statutory supervisors, "in light of the predetermined nature of their duties and the on-call status of supervisory level employees." *Id.* at D29. The Regional Director also explained that, "which engineering department employee responds to the [SPC]'s or [PC]'s request for service is determined by that department," and, further, that "the speed of his response is predetermined" by one of NEPEX's fourteen operating procedures. *Id.* at D32.

The Regional Director further found that, even if the SPCs and PCs exercised "independent judgment," they did not "responsibly * * * direct" other employees within the meaning of Section 2(11). Pet. App. D31-D32. The Regional Director explained that "[n]either the [SPCs] nor the [PCs] has any authority or control over the satellite employees"; rather, "[i]f the satellite employee is resistant to, or slow in complying with, [an] instruction, the [SPC] or [PC] will note this in his log and will report it to the [NEPEX] control room * * * supervisor," who is the individual responsible for "contact[ing] the satellite employee's supervisor to discuss the matter." *Id.* at D18. The same procedure applied, the Regional Director found, in cases of deficient job performance by employees of the NEPEX engineering department. *Ibid.* Further, the Regional Director noted, there was no evidence that any satellite or engineering department employee's status has been affected by such a report or inquiry from a PC or SPC. *Id.* at D18-D19. The Regional Director also explained that "the [SPCs] and [PCs] have almost no direct contact with the employees who actually perform the work that their instructions require be done"; rather, "[the SPCs and PCs] communicate with the generation and transmission operations through the satellites." *Id.* at D27. [5]

Finally, the Regional Director found that the SPCs do not exercise statutory supervisory authority over the PCs. Pet. App. D33. The Regional Director explained

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[5] In distinguishing this case from those in which employees of utility companies have been found to be supervisors, the Regional Director noted the comprehensive nature of the operating procedures applicable to the SPCs and PCs and their lack of direct contact with the employees who actually perform the work required by their instructions. Pet. App. D27-D28.

that "[t]he [PC]'s schedule is set by higher level management and their work assignments are predetermined," and that, although the SPCs have authority to call in a "spare" PC to fill in for an absent PC (and to require the PC then working to stay on the job until the "spare" PC arrives for work), the exercise of such authority by the SPCs "is a matter of routine." *Ibid.* The Regional Director further noted that there was no evidence that "an [SPC]'s comments to supervision regarding a [PC]'s performance has [*sic*] ever affected the [PC]'s employment status." *Ibid.*

b. Next, the Regional Director found that the SPCs and PCs are not "managerial employees." Pet. App. D36. The Regional Director explained that "the [NEPEX] Operating Procedures and related guidelines limit the discretion of the [SPCs] and [PCs] in the areas of increasing or decreasing power, approving or disapproving outage requests, controlling hydroelectric operations, and entering into contracts for the purchase and sale of power." *Id.* at D34-D35.[6] The Regional Director also noted that the SPCs and PCs had no occasion to make discretionary judgments respecting the creditworthiness of purchasers of power from the NEPOOL system, nor did the contracts for the purchase and sale of power have any direct financial impact upon petitioner. *Id.* at D36.

3. Petitioner requested review of the Regional Director's decision by the Board. The Board, with one

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[6] The Regional Director pointed out that the SPCs and PCs purchase and sell power "on a simple cost basis * * * determin[ing] the cost effectiveness of their contemplated actions either by the use of a computer or by manual calculations using a predetermined set of generation costs for the various types of power available." Pet. App. D35.

member dissenting, denied petitioner's request as raising no issue warranting review. Pet. App. C1-C2. On May 11, 1993, the Union won the representation election and was thereafter certified by the Board as the collective-bargaining representative of the SPCs and PCs. *Id.* at B3. Petitioner refused to bargain with the Union, however, and the Board's General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. B1. The Board granted the General Counsel's motion for summary judgment based on its finding that petitioner's refusal to bargain constituted an unfair labor practice, as alleged in the complaint, and entered an appropriate order. *Id.* at B1-B7.

4. The court of appeals enforced the Board's order. Pet. App. A1-A11. The court rejected petitioner's contention that the SPCs and PCs are "supervisors" under Section 2(11) of the Act because they use "independent judgment" to "responsibly direct" employees at the CONVEX satellite and in the NEPEX engineering department. *Id.* at A7-A8.[7] The court recognized that the SPCs and PCs are "highly trained employees who use independent judgment to make and implement complex technical decisions that affect the entire region's power supply." *Id.* A8. The court explained, however, that, under its decision in *Maine Yankee Atomic Power Co.* v. *NLRB*, 624 F.2d 347, 361 (1st Cir. 1980), "[t]o be responsible is to be answerable for the discharge of a duty or obligation." Pet. App. A8

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[7] In the court of appeals, petitioner argued that the SPCs and PCs responsibly directed only the staff of NEPEX's engineering department and of CONVEX, presumably because the staff of the other three satellites are not employed by petitioner. See Pet. App. D8, D29-D30.

(quoting *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6th Cir.), cert. denied, 338 U.S. 899 (1949)). Applying that test, the court found that SPCs and PCs do not "responsibly * * * direct" CONVEX employees, for "[t]he uncontroverted evidence established that [they] are not answerable for the conduct of satellite operators," but rather "are permitted merely to report CONVEX employee failures to NEPEX upper management, and it is upper management at the satellite that is ultimately responsible for the actions of CONVEX operators." Pet. App. A8. Nor do the SPCs and PCs "responsibly * * * direct" the employees in the NEPEX engineering department, the court determined, since "there is no evidence that they answer for engineering or equipment failures." *Ibid.*

The court further held that the record did not support petitioner's claim that the SPCs "supervise" PCs because the SPCs are "in charge" of the shift during nonbusiness hours. Pet. App. A8. The court pointed out that "[n]othing in the record suggests that [the SPCs] had ultimate responsibility for the plant's performance during nonbusiness hours"; that a supervisor is always on call during nonbusiness hours; that the SPCs do not hire, evaluate, or assign work to the PCs; that the SPCs "only as a matter of routine * * * fill an open shift from a preexisting list"; and that "SPCs are simply not held accountable if a PC disobeys a direct order, misquotes a price or causes a blackout." *Ibid.*

Finally, the court rejected petitioner's contention that the SPCs and PCs are "managerial employees." Pet. App. A9-A10. The court explained that, "[g]enerally, employees may be excluded from a bargaining unit on the basis of managerial status only if they 'represent * * * management interests by taking or recommending discretionary actions that effectively control or

implement employer policy.'" *Id.* at A10 (quoting *NLRB* v. *Yeshiva University*, 444 U.S. 672, 683 (1980)). The court found a "paucity of evidence tending to show managerial powers in the PCs or SPCs" under that test, for "[m]anagement policy at NEPEX is embodied in the Operating Procedures formulated by the Operations Committee." *Id.* at A10. Furthermore, the court found "no evidence that PCs or SPCs have a role in creation or implementation" of the operating procedures, or that they have "the authority to issue new ones." *Ibid.* The court observed that, at the core of the managerial question is the alignment of workers' and employers' interests. *Ibid.* In the present case, the court determined that, "[o]ther than the common goal of keeping the lights on, the record shows no such congruence of interests between [petitioner] and [the SPCs and PCs] sufficient to warrant the latter's exemption from the Act" as managerial employees. *Ibid.*

ARGUMENT

The court of appeals correctly upheld the Board's determination that petitioner's PCs and SPCs are neither "supervisors" within the meaning of Section 2(11) of the Act nor "managerial employees," as that term has been judicially explicated. Moreover, the court's decision turns largely on the facts of this case and does not conflict with any decision of this Court or another court of appeals. Further review therefore is not warranted.

1. a. To determine whether petitioner's PCs and SPCs are "supervisors" on the ground that they have authority "responsibly to direct" other employees, the court of appeals relied on its decision in *Maine Yankee Atomic Power Co.* v. *NLRB*, 624 F.2d 347 (1st Cir. 1980). *Maine Yankee* stated that, for purposes of Section 2(11),

"[t]o be responsible is to be answerable for the discharge of a duty or obligation." Pet. App. A8 (quoting *Maine Yankee*, 624 F.2d at 361 (quoting *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6th Cir.), cert. denied, 338 U.S. 899 (1949))). That test was first articulated in *Ohio Power* and has generally been followed not only by the First Circuit but also by other courts of appeals (see pp. 14-15, *infra*). Applying the *Ohio Power* test here, the court held that petitioner's SPCs and PCs do not "responsibly * * * direct" other employees, since petitioner does not hold the SPCs and PCs "answerable for the conduct" of employees at the CONVEX satellite operation or "for engineering or equipment failures," nor does it hold the SPC on a shift "accountable" in the event that a PC "disobeys a direct order, misquotes a price or causes a blackout." Pet. App. A8.[8]

There is no merit to petitioner's contention (Pet. 10) that the court of appeals' construction of the statutory term "responsibly to direct" "superimpose[s] conditions on 'supervisory' status" that are inconsistent with this

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[8] Although the Regional Director did not expressly rely on the *Ohio Power* test, her findings support the court of appeals' holding that under that test the SPCs and PCs are not supervisors. The Regional Director found that the PCs and SPCs did not have the authority "responsibly to direct" employees at the CONVEX satellite and in the NEPEX engineering department because they have "no authority or control" over these employees; rather, in the event that these employees do not perform their jobs properly, the SPC's or PC's only recourse is to report the deficiency to his supervisor at NEPEX, who then contacts the offending employee's supervisor, whose duty it is to deal with the problem. Pet. App. D18, D31-D32. While petitioner "contests the factual basis" for the court of appeals' conclusions (Pet. 8), it does not show that the court so "grossly misapplied" the substantial evidence standard as to warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Court's decision in *NLRB* v. *Health Care & Retirement Corp.*, 114 S. Ct. 1778 (1994). *Health Care* involved the Board's construction of Section 2(11)'s phrase "in the interest of the employer," not the term "responsibly to direct." See 114 S. Ct. at 1780. The Court in *Health Care* invalidated the Board's rule that "a. nurse's supervisory authority is not exercised in the interest of the employer if it is incidental to the treatment of patients." *Id.* at 1782-1783. The Court made clear, however, that its holding "casts no doubt on Board or court decisions interpreting parts of [Section] 2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 1785. Indeed, the Court specifically acknowledged that the phrase "responsibly to direct" is ambiguous and subject to interpretation by the Board and the courts with respect to particular categories of employees. *Id.* at 1783.[9]

b. There is also no merit to petitioner's claim (Pet. 8-9) that the decision of the court below conflicts with decisions of the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits holding that the control room personnel of a utility company were statutory supervisors.

As an initial matter, petitioner mischaracterizes the decision below. Contrary to petitioner's assertion, the test of "responsible direction" applied by the court of appeals does not require the employer to "produc[e] evidence that directives were not followed and the supervisor in fact was held responsible," Pet. 9. The

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[9] The Board is currently considering how to interpret the statutory phrase "responsibly to direct" in the health-care field, in light of this Court's decision in *Health Care*. See *Providence Hospital*, No. 19-RC-12866, and *Ten Broeck Commons Nursing Home*, No. 3-RC-10166; the Board heard oral argument in those cases on October 28, 1994.

court's test was satisfied by objective evidence that, if an employee at the CONVEX satellite operation or in the NEPEX engineering department does not perform properly, the SPC's or PC's only recourse is to report the deficiency to his or her supervisor at NEPEX, who then contacts the offending employee's supervisor, whose duty it is to deal with the problem. Pet. App. A8, D18.

There is no difference between the test applied by the court below and that applied in the decisions upon which petitioner relies in asserting a conflict. The other decisions have held that utility company control room personnel were supervisors by applying the same test to facts quite different from those of this case.

Thus, in *Monongahela Power Co.* v. *NLRB*, 657 F.2d 608 (1981), cited at Pet. 8, the Fourth Circuit applied the test of "responsible direction" set forth in *Ohio Power*, as did the court of appeals in this case, in assessing whether the employer's "control room foremen" were statutory supervisors. The Fourth Circuit determined that those employees were supervisors on the facts of that case. See 657 F.2d at 613.[10]

In *NLRB* v. *McCullough Environmental Services, Inc.*, 5 F.3d 923 (1993), cited at Pet. 8, the Fifth Circuit held that the "lead operators" at a wastewater treatment plant responsibly directed other employees. Although the Fifth Circuit in *McCullough* did not expressly rely on the *Ohio Power* test, it attached importance to a fact

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[10] The court in *Monongahela* found the functions of the control room foremen to be "quite similar" to those of the "shift operating supervisors" found to be statutory supervisors in *Maine Yankee*. 657 F.2d at 613. The court below, in contrast, found that *Maine Yankee* was factually distinguishable from the instant case. Pet. App. A9.

that is relevant under that test: It noted that the employer maintained a written policy of holding the lead operators responsible for the actions of employees on their shifts. 5 F.3d at 941 n.26. Moreover, the Fifth Circuit relied on *Maine Yankee*, which adopted the *Ohio Power* test, in another case involving the issue of responsible direction. See *NLRB* v. *KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986) ("In determining whether 'direction' in any particular case is responsible, the focus is on whether the alleged supervisor is 'held fully accountable and responsible for the performance and work product of the employees' he directs.") (quoting *Maine Yankee*, 624 F.2d at 361).

Nor is petitioner's claim of a circuit conflict supported by *Southern Indiana Gas & Elec. Co.* v. *NLRB*, 657 F.2d 878 (7th Cir. 1981), or *NLRB* v. *Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1976). In those cases, the courts determined that the duties of the "system supervisors" involved there were "strikingly similar" (*Southern Indiana*, 657 F.2d at 883) and "virtually identical" (*Detroit Edison*, 537 F.2d at 242) to those of the "system load supervisors" held to be statutory supervisors in *Arizona Public Service Co.* v. *NLRB*, 453 F.2d 228 (9th Cir. 1971). In *Arizona Public Service*, in turn, the court applied the *Ohio Power* test to hold that "system load supervisors" involved there responsibly directed other employees, 453 F.2d at 231. Thus, all three decisions—*Southern Indiana*, *Detroit Edison*, and *Arizona Public Service*—ultimately rested on an application, to particular factual circumstances, of the same test that was applied by the court below. See Pet. App. A8.

2. Petitioner also contends (Pet. 10-11) that its SPCs and PCs are "managerial employees" because they "implement" the policies set forth in the NEPEX operating procedures. That contention is without merit.

As discussed (note 4, *supra*), in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), this Court stated that an employee is managerial "only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id.* at 683. The court of appeals, applying that test, agreed with the Board that "[t]here is no evidence that PCs or SPCs have a role in the creation or implementation of the Operating Procedures." Pet. App. A10. The court of appeals' assessment of the evidentiary record is a factbound matter that does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Moreover, petitioner errs in contending that the Board and the court of appeals "effectively have eliminated any impact of the phrase 'or implement' from this Court's language in *Yeshiva*." Pet. 10. In support of that contention, petitioner asserts that, within the framework of the operating procedures, the SPCs and PCs exercise considerable discretion. Petitioner's conception of what constitutes "implement[ing] employer policy" (*Yeshiva University*, 444 U.S. at 683), however, conflicts with the settled principle that "the authority to exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy." *NLRB* v. *Wilson-Crissman Cadillac, Inc.*, 659 F.2d 728, 730 (6th Cir. 1981); accord *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 288 n.16 (1974). Here, the Board found that the fourteen NEPEX operating procedures establish a comprehensive policy, "deal[ing] with every area of [their] duties and provid[ing] the [SPCs] and [PCs] with specific instructions, guidelines, and controls concerning their operation of the system." Pet. App. D10 n.4; see also *id.* at D21. In light of that finding, the Board reasonably

concluded (*id.* at D34-D35) that "the Operating Procedures and related guidelines limit the discretion of the [SPCs] and [PCs]" to such a degree as to warrant a finding that the SPCs and PCs are not managerial employees, and the court of appeals properly upheld the Board's conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1093

In the Supreme Court of the United States

OCTOBER TERM, 1994

NORTHEAST UTILITIES SERVICES CORPORATION,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 455, AFL-CIO-CLC,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S, INTERNATIONAL BROTHERHOOD of ELECTRICAL WORKERS, LOCAL 455, AFL-CIO-CLC, BRIEF IN OPPOSITION

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RESPONDENT'S, INTERNATIONAL BROTHERHOOD of ELECTRICAL WORKERS, LOCAL 455, AFL-CIO-CLC, BRIEF IN OPPOSITION

International Brotherhood of Electrical Workers, Local 455, AFL-CIO-CLC, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the First Circuit.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict With The Decisions Of This Court.

Petitioner claims that the decision below was contrary to the opinions of this court with respect to managerial and supervisory status under the National Labor Relations Act. In support of this conclusion, Petitioner relies upon this Court's opinions in *NLRB* v. *Health Care & Retirement Corp. of America*, __ U.S. __, 114 S.Ct. 1778, (1994) and *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980). In *Health Care*, this Court determined whether certain nurses were employed as "Supervisors" as defined under 29 U.S.C. section 152(11) of the National Labor Relations Act. Similarly in *Yeshiva*, this Court discussed the applicability of a judicially implied exclusion to the act for "managerial employees." The lower Court's decision was completely consistent with these opinions.

In order to qualify as a Supervisor within the meaning of section 2(11), an employee must possess one of twelve (12) specifically enumerated powers. He must also exercise such authority by the "use of independent judgment" and "in the interest of the employer." *NLRB* v. *Health Care & Retirement Corp. of America*, __ U.S. __, 114 S.Ct. 1778, 1780 (1994) Petitioner claims that PCs and SPCs "responsibly direct" other employees by the "use of independent judgment" and "in the interest of the employer" and thus qualify as "Supervisors" within the meaning of section 2(11). While the lower court conceded that PCs and SPCs exercised independent judgment in the interest of the employer, the court did not agree with petitioner's contention that they "responsibly direct" other employees.

Although this Court has never directly defined the term "responsibly direct" it did acknowledge in *Healthcare* that terms such as "independent judgment" and "responsibly direct" are ambiguous and the Board must therefore be given "ample room to apply them to different categories of employees." *NLRB* v. *Healthcare*, __ U.S. __, 114 S.Ct. 1778, 1783 (1994) Similarly, this Court in *Yeshiva* acknowledges that Courts will accord the Board deference so long as its "conclusions are rationally based on articulated facts and consistent with the Act." 444 U.S. 672, 691 (1980). The lower Court embraced this notion when it stated "we are especially deferential to the Board's determination of Supervisory status because we recognize the Board's competence and experience in applying the Act to the complexities of Industrial Life." (App. A7). In light of this wide latitude granted to the Board, the lower Court's decision with respect to Supervisory status was clearly consistent with the prior decisions of this Court.

The lower Court also correctly concluded that PCs and SPCs do not qualify for "Managerial" status. In *Yeshiva*, this Court noted that "Managerial employees" are defined as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB* v. *Yeshiva University*, 444 U.S. 681 (1980) quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 283-89, 94 S.Ct. 1757, 1766-69, 40 L.Ed. 2d 134 (1974). Employees will establish Managerial status "only if they represent Management interests by taking and recommending discretionary actions that effectively control or implement employer policy" (*Ibid.* at 683).

Petitioner maintains that the lower Court violated *Yeshiva* because "whether to proceed with scheduled power outages as well as how to react to emergency losses of generation could not be more central to the implementation of NEPEX Policy and purpose." (pet. brief p. 11) The lower Court correctly rejected Petitioner's argument particularly in light of the fact

that "management policy at NEPEX is embodied in the operating procedures formulated by the operations committee" (App. A. 10). Consequently, PCs and SPCs have no role in the creation or implementation of operating procedures. Additionally, the Court failed to find the kind of "congruence of interest" in the present case, which formed the basis for Management status in *Yeshiva*. The lower Court's decision is therefore completely consistent with this Court's prior decisions.

II. There Is No Conflict With The Decisions Of Other Circuit Courts Of Appeals.

The lower Court's decision is consistent with those Circuit Courts which have addressed the issue in this case. As stated above, the only issue with respect to supervisory status pursuant to section 2(11) is whether the PCs and SPCs "responsibly direct" other employees. In *Ohio Power*, the 6th Circuit held that "to be responsible is to be answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity, and integrity and is implied power." *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 998 U.S. 899, 70 S.Ct. 299, 94 L.Ed. 553 (1949) This definition was later adopted by the 1st Circuit in *Maine Yankee. Maine Yankee Atomic, Etc.* v. *NLRB*, 624 F.2d 347, 361 (1980) Petitioner conveniently overlooks these prominent Circuit Court cases and instead elects to redefine the issue by contending that "individuals in positions *nearly identical* to those in dispute here were neither Supevisors or Managers." (Emphasis added) (Pet. Brief p. 8) Unfortunately, this statement does not contemplate the fact that the cases relied upon by Petitioner do not address the narrow question of whether the PCs and SPCs "responsibly direct" other employees.

Consistent with *Maine Yankee* and *Ohio Power* the lower Court found that "PCs and SPCs are not answerable for the

conduct of satellite operators" nor is there any "evidence that they answer for engineering or equipment failures." (App. A8) Consequently, the decision of the lower Court was consistent with other Circuit Court decisions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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